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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 513.

GEORGE WEEMS WILLIAMS, RECEIVER OF THE WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILROAD COMPANY,
Petitioner,

versus

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

R. E. LEE MARSHALL,
City Solicitor,
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Counsel for Respondent.

The Daily Record Co. Print, Baltimore.

INDEX.

	PAGE
OPINION OF CIRCUIT COURT OF APPEALS, Balto. v. Williams, 61 Fed. (2d) 374	1
JURISDICTION	2
STATEMENT OF THE CASE	2
RESUME OF ARGUMENT	8
ARGUMENT	10
Rules of Construction Applicable	10
Article 15 of the Declaration of Rights of the Maryland Constitution violated	12
History, Object and Purpose of Article 15	12
Judicial Interpretation of Article 15	17
Test of Constitutionality of Tax Exemptions Applicable to Chapter 497	23
Exemption of Individual Railroad from Taxation not Approved by Court of Appeals of Maryland	32
Chapter 497 Not a Contract	50
Article 3, Section 33 of the Maryland Constitution Violated	63
Judicial Interpretation of Article 3, Section 33	63
Public General Laws of Maryland re Taxation and Exemption of Railroad Property	68
Chapter 497 is Void as a Special Law	69
Chapter 497 not a Law for Special Purposes	72
Article 3, Section 29 of Maryland Constitution Violated	75
Fourteenth Amendment of the United States Constitution Violated	78
Payment under Franchise Ordinance Not a Tax	86

PAGE

Payment made under Franchise Ordinance Not a Charge in the Nature of a Tax 91

Chapter 497 Makes NO Attempt to Exempt Business of Railroad Company from Taxation 92

Case of United Railways vs. Baltimore (111 Md. 264) in Accord with Decision of Court Below 93

Chapter 497 Further Violative of Article 3, Section 29 of Maryland Constitution 95

Article 11-A of the Maryland Constitution Violated 99

Chapter 497 Violates Contract Clause of Federal Constitution 105

CONCLUSION 110

APPENDIX A 112

APPENDIX B 114

TABLE OF CASES

Adams vs. Plunkett, 274 Mass. 453 ..... 10, 106
Air-Way Corporation vs. Day, 266 U. S. 71 80
Appeal Tax Court of Balto. City vs. Grand Lodge, 50 Md. 421 ..... 38, 55, 56
Baltimore vs. B. & O. R. R. Co., 6 Gill 288 ..... 32, 67
Baltimore vs. Cahill, 126 Md. 596 ..... 8, 9, 15, 20, 49, 80
Baltimore vs. German American Fire Ins. Co., 132 Md. 380 ..... 29, 49, 75
Baltimore vs. Starr Church, 106 Md. 281 ..... 8, 9, 15, 17, 23, 29, 30, 44, 45, 46, 49, 63, 71, 75, 80, 111
Baltimore vs. United Railways & Elec. Co., 107 Md. 250 ..... 9, 94, 103
Baltimore vs. United Railways & Electric Co., 126 Md. 39 ..... 67, 68, 72, 74
Baltimore vs. Williams, 61 Fed. (2d) 374 ..... 1, 7, 8, 9, 10, 22, 29, 36, 47, 63, 71, 75, 81, 83, 86, 87, 90, 91, 92

PAGE

Baltimore City vs. Allegany County, 99 Md. 1 ..... 8, 65
Baltimore Union Passenger Ry. Co. vs. Baltimore, 71 Md. 405 ..... 9, 94, 103
B. C. & A. Ry. Co. vs. Ocean City, 89 Md. 89 ... 32, 40, 44, 46
B. C. & A. Ry. Co. vs. Wicomico County, 93 Md. 113 ..... 32, 40, 44, 46
B. C. & A. Ry. Co. vs. Wicomico County, 103 Md. 277 ..... 24, 25, 33, 38, 40, 44, 46, 53, 54, 55, 58, 69
Berryman vs. Whitman College, 222 U. S. 334 ..... 8, 11
Boston vs. Jackson, 260 U. S. 309 ..... 10, 106, 107, 109
Boyd vs. Alabama, 94 U. S. 645 ..... 42, 43, 62
C. & P. Telephone Co. vs. Baltimore, 89 Md. 689 ... 100
Chicago G. W. Ry. Co. vs. Kendall, 266 U. S. 94 ... 42, 111
Christ's Church vs. Philadelphia, 65 U. S. 300 (24 How. 300) 37, 61
Cincinnati vs. Vester, 281 U. S. 439 ..... 42, 111
Collins vs. Johnston, 237 U. S. 502 23
Commissioners vs. Lucas, 93 U. S. 108 ..... 10, 106, 107
Crisfield vs. C. & P. Telephone Co., 131 Md. 444 ... 8, 66
Culp vs. Commissioners of Chestertown, 154 Md. 620 ..... 10, 96, 98
Curtis vs. Mactier, 115 Md. 386 ..... 8, 15, 49, 99
Dinneen vs. Rider, 152 Md. 343 107
Fertilizing Co. vs. Hyde Park, 97 U. S. 659 ..... 38, 62
Grand Lodge vs. New Orleans, 166 U. S. 143 ..... 38, 53, 54, 55, 61, 62
Gregg vs. Public Service Commission, 121 Md. 1 ... 41
Gulf, Colorado and Sante Fe Ry. Co. vs. Ellis, 165 U. S. 150 ..... 9, 77
Hagerstown vs. Littleton, 143 Md. 591 107
Havre de Grace vs. Bridge Co., 145 Md. 491 ... 10, 44, 47, 48
Hunter vs. Pittsburgh, 207 U. S. 161 ..... 10, 107, 108
In re. Tyler, 149 U. S. 164 2
Joplin Mercantile Co. vs. United States, 236 U. S. 531 42
Kafka vs. Wilkinson, 99 Md. 238 ..... 8, 76, 99
Kelman vs. Ryan, 163 Md. (Decided January 3, 1933) 9, 31, 83
King vs. Mullins, 171 U. S. 404 ..... 42, 111

PAGE

Knights of Pythias vs. Baltimore, 157 Md. 542 ... 11
Light vs. United States, 220 U. S. 523 ... 42, 111
Littleton vs. Hagerstown, 150 Md. 163 ... 8, 66, 68, 74
Louisville & Nashville R. R. Co. vs. Palmes, 109 U. S. 244 ... 27, 62
Louisville Gas & Electric Co. vs. Coleman, 277 U. S. 32 ... 9, 79
Luman vs. Hitchens Bros. Co., 90 Md. 14 ... 10, 85, 96
Maxwell vs. State, 40 Md. 273 ... 8, 15, 49
Memphis & Charleston Ry. vs. Pace, 282 U. S. 241 ... 80
Michigan Central Railroad vs. Powers, 201 U. S. 245 ... 9, 80
Mobile & Ohio R. R. Co. vs. Tennessee, 153 U. S. 486 ... 35
Mount Hope Cemetery vs. Boston, 158 Mass. 509 16, 106
Newton vs. Commissioners, 100 U. S. 548 ... 38, 62
Northern Central Ry. Co. vs. Maryland, 187 U. S. 258 ... 62
Ohio Oil Company vs. Conway, 281 U. S. 146 ... 80
Old Colony Trust Co. vs. Omaha, 230 U. S. 100 ... 23
Painter vs. Mattfeldt, 119 Md. 466 ... 10, 96
Park Tax Cases, 84 Md. 1 (Baltimore vs. Baltimore, etc. R. Co.) ... 9, 93, 94, 103
Pennsylvania R. R. Co. vs. Miller, 132 U. S. 75 ... 38, 62
Pitznogle vs. Western Md. R. R. Co., 119 Md. 673 107
Prince George's County vs. Balto. & Ohio Ry. Co., 113 Md. 179 ... 8, 64
Prince George's County vs. Laurel, 70 Md. 443 ... 8, 15, 49
Quaker City Cab Co. vs. Pennsylvania, 277 U. S. 389 ... 9, 80, 81
Railroad Companies vs. Gaines, 97 U. S. 697 ... 63
Royster Guano Co. vs. Virginia, 253 U. S. 412 ... 9, 80
Salt Co. vs. East Saginaw, 80 U. S. 373 ... 38
Schlesinger vs. Wisconsin, 270 U. S. 230 ... 80
Schley vs. Lee, 106 Md. 390 ... 8, 15, 21, 22, 49, 53
Seton Hall College vs. So. Orange, 242 U. S. 100 37, 54, 61
Siler vs. Louisville & Nashville R. R. Co., 213 U. S. 175 ... 42, 111

PAGE

St. Louis vs. Western Union Tel. Co., 148 U. S. 92 ..... 9, 91
Stanislaus Co. vs. San Joaquin C. & I. Co., 192 U. S. 201 ..... 38, 62
State vs. B. & O. R. R. Co., 48 Md. 49 ..... 32, 34, 44, 46
State vs. B. & O. R. R. Co., 127 Md. 434 ..... 32, 39, 40, 44, 46
State vs. C. & P. R. R. Co., 40 Md. 22 ..... 15, 16
State vs. Norris, 70 Md. 41 41
State vs. Northern Central Ry. Co., 44 Md. 131 ..... 15, 24
State vs. Northern Central Ry. Co., 90 Md. 447 ..... 44, 47, 63
State vs. P. W. & B. R. R. Co., 45 Md. 361 ..... 15, 17
State vs. Stewart, 152 Md. 419 ..... 10, 101, 102, 106
State vs. The Schultz Co., 83 Md. 58 ..... 10, 96
Susquehanna Power Co. vs. Tax Commission, 159 Md. 334 ..... 14, 15
Trade-Mark Cases, 100 U. S. 82 29
Trenton vs. New Jersey, 262 U. S. 182 ..... 107, 108
Troy Union R. R. Co. vs. Mealy, 254 U. S. 47 ..... 38, 62
Tucker vs. Ferguson, 22 Wallace 527 (89 U. S. 527) 37, 61
United Railways vs. Baltimore, 111 Md. 264 ..... 9, 93, 94, 103
United States vs. Delaware & Hudson Co., 213 U. S. 366 29
United States vs. La Franca, 282 U. S. 568 ..... 9, 86
United States vs. Reese, 92 U. S. 214 28
Weber vs. Probey, 125 Md. 544 ..... 8, 10, 41, 76, 77, 96
Wells vs. Hyattsville, 77 Md. 125 ..... 8, 15, 19, 49
Westminster vs. Cons. Public Utilities Co., 132 Md. 374 ..... 8, 66
West Wisconsin Ry. Co. vs. Supervisors, 93 U. S. 595 ..... 37, 51, 53, 54, 55, 61
Wicomico County vs. Bancroft, 135 Fed. 977 ..... 25, 26
Wicomico County vs. Bancroft, 203 U. S. 112 ..... 26, 40
Wisconsin & Michigan Ry. Co. vs. Powers, 191 U. S. 379 ..... 38, 62
Yazoo & Mississippi Valley Ry. Co. vs. Adams, 180 U. S. 1 ..... 53, 63

PAGE

STATUTES AND ORDINANCES CITED.

Acts of the General Assembly of Maryland 1826—
Chapter 123 ..... 33, 35
Acts of the General Assembly of Maryland 1876—
Chapter 159 24
Acts of the General Assembly of Maryland 1878—
Chapter 155 39
Acts of the General Assembly of Maryland 1880—
Chapter 16 47
Acts of the General Assembly of Maryland 1886—
Chapter 133 58
Acts of the General Assembly of Maryland 1890—
Chapter 559 47
Acts of the General Assembly of Maryland 1892—
Chapter 285 20
Acts of the General Assembly of Maryland 1900—
Chapter 579 65
Acts of the General Assembly of Maryland 1906—
Chapter 566 ..... 72, 74
Acts of the General Assembly of Maryland 1908—
Chapter 398 64
Acts of the General Assembly of Maryland 1910—
Chapter 341 66
Acts of the General Assembly of Maryland 1914—
Chapter 197 49
Acts of the General Assembly of Maryland 1914—
Chapter 390 14
Acts of the General Assembly of Maryland 1914—
Chapter 416 114
Acts of the General Assembly of Maryland 1914—
Chapter 470 20
Acts of the General Assembly of Maryland 1931—
Chapter 497..... 2, 4, 5, 6, 7, 8, 9, 10, 12, 22, 23, 27, 29, 30, 32, 35, 37, 41, 45, 46, 50, 51, 54, 55, 57, 62, 63, 65, 66, 67, 69, 70, 71, 72, 74, 75, 76, 77, 78, 86, 92, 95, 96, 99, 104, 105, 107, 109, 110, 111

PAGE

Annotated Code of Maryland—Article 23, Section 283 64
Annotated Code of Maryland—Article 23, Section 380 (Public Service Commission Law of Maryland) 52
Bagby's Annotated Code of Maryland 1911—Article 81, Section 193 24
Bagby's Annotated Code of Maryland 1924—Article 81, Section 204 24
Bagby's Annotated Code of Maryland (1929 Supplement)—Article 81, Section 6, Paragraphs 1 and 2 ..... 22, 24, 68, 69, 112
Bagby's Annotated Code of Maryland (1929 Supplement)—Article 81, Section 7, Paragraphs 16 and 21 ..... 8, 24, 30, 68, 69, 72, 75, 112
Baltimore City Charter—Section 6, Subsection 26-A 105
Baltimore City Charter—Section 6, Subsection 26-G 100
Baltimore City Charter—Section 7 ..... 100, 105
Baltimore City Charter—Section 8 ..... 100, 104, 106
Federal Constitution—Article 1, Section 10, Clause 1 107
Fourteenth Amendment of the Federal Constitution 9, 78, 80, 81, 83, 85, 107, 109
Franchise Ordinance No. 123 of the Mayor and City Council of Baltimore, approved April 27, 1906 ..... 4, 9, 86, 89, 92, 94, 99, 103, 104, 105
Maryland Code of 1888—Article 81, Section 155 24
Maryland Code of 1904—Article 81, Section 189 24
Maryland Constitution—Article 3, Section 29 ..... 8, 9, 76, 77, 95, 96, 99, 110
Maryland Constitution—Article 3, Section 33 ..... 7, 8, 63, 64, 65, 66, 67, 69, 70
Maryland Constitution—Article 3, Section 40 107
Maryland Constitution—Article 3, Section 48 26
Maryland Constitution—Article 11-A (Home Rule Amendment) 10, 99, 101, 102, 103, 104, 105, 107, 109, 114
Maryland Constitution—Article 15 of the Declaration of Rights 8, 13, 15, 16, 17, 18, 19, 22, 23, 27, 31, 110

PAGE

United States Code—Title 49, Section 1, Paragraphs 18 and 19 52

TEXTBOOKS, ENCYCLOPEDIAS, ETC., CITED.

American Law Reports, Volume 56, page 376 107
Columbia Law Review, Volume 13, page 106 38
Cooley on Taxation, Volume 2, page 1488 38
Niles on Constitutional Law, page 24 13
Niles on Constitutional Law, page 206 26
Records and Briefs of Maryland Court of Appeals, Volume 106, Part 3, page 281 47
Ruling Case Law, Volume 6, page 66 42
Ruling Case Law, Volume 6, page 77 41
Ruling Case Law, Volume 6, page 79 29
Ruling Case Law, Volume 6, page 85 23
Ruling Case Law, Volume 26, page 13 ..... 9, 86
Ruling Case Law, Volume 26, page 274 93
Ruling Case Law, Volume 26, page 301 62
Ruling Case Law, Volume 26, page 305 63
Willoughby on the Constitution of the United States, Volume 1, 2nd Ed., page 34 29
Willoughby on the Constitution of the United States, Volume 1, 2nd Ed., page 25 42

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BRIEF ON BEHALF OF RESPONDENT.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit was rendered on October 3, 1932, and is reported in 61 Fed. (2d) 374. It is also printed at pages 20-37 of the Record.

The oral opinion of the United States District Court for the District of Maryland (William C. Coleman, Judge) was delivered on May 16, 1932, and has not been reported. It is printed at pages 12-16 of the Record.

JURISDICTION.

Federal jurisdiction in this case originated in the appointment on January 27, 1931, of the Petitioner as Receiver for the Washington, Baltimore and Annapolis Electric Railroad Company by the United States District Court for the District of Maryland in the case of R. E. Duvall Company, Inc., vs. Washington, Baltimore and Annapolis Electric Railroad Company, No. 1826 Equity. Pursuant to an order of the District Court, the Respondent filed its claim in that Court for taxes due on the property of the Railroad and moneys due under a franchise ordinance granting the Railroad the right to use the streets of Baltimore City. In re Tyler, 149 U. S. 164.

The case comes before this Court on writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted by this Court December 5, 1932 (R. 38).

STATEMENT OF THE CASE.

The fundamental issue involved in this appeal is the constitutionality *vel non* of Chapter 497 of the Acts of the General Assembly of Maryland of 1931 exempting the railroad property of the Washington, Baltimore and Annapolis Electric Railroad Company from State, City and County taxation for a period of two years.

Chapter 497 of the Acts of 1931 is as follows:

> "AN ACT to exempt the railroad property of the Washington, Baltimore and Annapolis Electric Railroad Company, or so much thereof as may be used for railroad purposes by said company, its receiver, successors and assigns, from all State taxes and charges, including contributions to the cost of construction of railroad crossings made or to be made under the authority of the State Roads

Commission, and from all county and city taxes and charges in the nature of a tax for the years during which the property is so used, but not exceeding two years beginning January 1, 1931.

WHEREAS, The Washington, Baltimore and Annapolis Electric Railroad Company did not in the year 1930 earn its operating charges, and it is of the utmost importance for the welfare of the State and particularly the communities served by said railroad, that the operation of said railroad be continued, and

WHEREAS, It is in the judgment of the General Assembly of Maryland a wise and sound public policy to encourage the continued operation of said railroad by the exemption herein provided:

SECTION 1. *Be it Enacted by the General Assembly of Maryland,* That the railroad property of the Washington, Baltimore and Annapolis Electric Railroad Company, or so much thereof as may be used for railroad purposes by said company, its receiver, successors and assigns, be exempt from all State taxes and charges, including contributions to the cost of construction of railroad crossings made or to be made under the authority of the State Roads Commission, and from all county and city taxes and charges in the nature of a tax for the years during which the property is so used, but not exceeding two years beginning January 1, 1931.

SEC. 2. *And be it Further Enacted,* That this Act shall take effect June 1, 1931."

The Respondent maintains that this Act is unconstitutional and void as an unreasonable and arbitrary exercise of power by the General Assembly of Maryland in conflict with and in violation of express restrictions and limitations imposed upon the General Assembly by the Constitution of the State of Maryland, and as a denial of the equal protection of the laws and as an impairment of the

obligation of contracts in contravention of the Constitution of the United States.

A secondary issue, contingent upon this Honorable Court construing Chapter 497 of the Acts of 1931 as constitutional, is the applicability *vel non* of the alleged exemption from taxation embodied in said Act to the so-called taxes due under a franchise ordinance of the Mayor and City Council of Baltimore, viz: Ordinance No. 123, approved April 27, 1906, granting the right to the Railroad Company to construct, maintain and use railway tracks upon certain streets in the City of Baltimore, and to operate cars over and upon the tracks authorized to be constructed, and providing the conditions upon which said rights should be exercised and the compensation to be paid therefor, the pertinent portions of said ordinance being as follows:

> "Sec. 13. And be it further ordained, That in consideration of the several rights, privileges and franchises herein granted to the Baltimore Terminal Company, the Washington, Baltimore and Annapolis Electric Railway Company and the Baltimore and Annapolis Short Line Railroad Company, each of said grantees, their successors or assigns, hereby agrees to pay and shall pay to the Mayor and City Council of Baltimore in quarterly instalments, on the first days of January, April, July and October of each and every year a tax of four and one-half mills for every passenger above the age of twelve years, and of two and seven-tenths mills for every passenger betwen the ages of four and twelve years, carried by it, respectively, over the tracks hereby authorized, or any part thereof, for a whole or part trip within the present limits of the City of Baltimore, or as the same may be hereafter extended from time to time, and without regard to the fact that their lines of railway, or any part thereof, are or may be situated upon private rights of way instead of city

streets, and also without regard to the fact whether such passenger has boarded the car within or without the city limits, as the same now exist or may be hereafter extended from time to time; and each of the said grantees also agrees to pay and shall also pay to the said Mayor and City Council of Baltimore, in quarterly instalments, on the first days of January, April, July and October of each and every year, a tax of one per cent upon their respective gross receipts derived from mail, baggage, express matter, milk, truck and light freight carried by it, respectively, over any of their respective lines from or to any point on the tracks hereby authorized within the present limits of the City of Baltimore, or as the same may be hereafter extended from time to time, without regard to the place of origin or destination of said mail, baggage, express matter, milk, truck and light freight, and the Baltimore Terminal Company shall also pay to the Mayor and City Council of Baltimore the sum of five hundred dollars, said sum to be paid to the Mayor and City Council of Baltimore upon commencement of work by it under this ordinance."

"Sec. 14. And be it further ordained, That upon the failure of the said grantees, or any of them, their successors or assigns, to comply with any of the terms or conditions of this ordinance, the rights, privileges and franchises hereby granted shall be and become wholly null and void."

"Sec. 15. And be it further ordained, That neither the passage of this ordinance, nor anything contained herein, especially the provision herein for compensation to the city, shall be taken as in any wise prejudicing the pending contention of the city with reference to the assessability and taxability of street franchises or easements."

The Respondent submits that Chapter 497 of the Acts of 1931 cannot in any case apply to the moneys due by the Railroad Company under the aforesaid franchise ordi-

nance, and consequently cannot affect the liability of the Railroad Company with regard thereto, inasmuch as the payments required by the franchise ordinance, arising from a contractual agreement between the City and the Railroad Company, do not fall within the purview of said statute, which attempts to relieve the Railroad Company from paying taxes or charges in the nature of a tax on the railroad property.

This case originally arose in the receivership proceedings of the Washington, Baltimore and Annapolis Electric Railroad Company in the District Court of the United States for the District of Maryland (R. E. Duvall Company, Inc., vs. Washington, Baltimore and Annapolis Electric Railroad Company).

The Petitioner having been appointed Receiver was authorized and directed by the said District Court to notify any claimant for State, City or County taxes on the railroad property of the defendant corporation that they should file in said Court a petition setting forth said claim. In accordance therewith, the Respondent filed a petition setting forth its claim for taxes assessed upon the property of the Railroad Company pursuant to the general laws of Maryland, amounting to approximately $50,000.00, and for amounts due for the use of the streets of Baltimore under the provisions of the aforesaid franchise ordinance, approximating $20,000.00 (Record, pp. 2-3).

The Petitioner answered said petition, denying that the sums of money alleged to be due and payable as set forth in said petition were payable by the said Receiver, and claiming that under Chapter 497 of the Acts of the General Assembly of Maryland of 1931, neither the de-

fendant corporation nor the Receiver thereof was under any obligation or liability to pay the taxes set forth or referred to in said petition, and further claiming that the said Act was valid and constitutional in every respect (R., pp. 4-5).

The District Court dismissed the petition of the Respondent (R., p. 16) and delivered an oral opinion (R., pp. 12-16) at the conclusion of argument by counsel, in which it held that Chapter 497 of the Acts of 1931 was valid and constitutional and that the moneys claimed in the petition of the Respondent were not due and payable by the Petitioner.

On appeal to the United States Circuit Court of Appeals for the Fourth Circuit, the District Court was reversed. Senior Circuit Judge Parker, delivering the opinion of the Circuit Court (R., pp. 21-37) 61 Fed. (2d) 374, held that Chapter 497 of the Acts of the General Assembly of Maryland of 1931 had no application to the moneys due by the Railroad Company under the aforesaid franchise ordinance, and consequently, did not affect the liability of the Railroad Company in regard thereto, and that the said Act was moreover unconstitutional and void as violative of the Fourteenth Amendment of the Federal Constitution, the uniformity provision of the Maryland Constitution and Article 3, Section 33 of the Maryland Constitution.

Thereafter, this Honorable Court granted the Petitioner's request for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

PAGE

RESUME OF ARGUMENT.

A. CHAPTER 497 VIOLATES THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF MARYLAND.

(1) In determining the constitutionality of Chapter 497, the power of the Legislature to enact the same must be strictly construed. Berryman vs. Whitman College, 222 U. S. 334 10

Chapter 497 is unconstitutional and viod because:

(2) It is an unreasonable and arbitrary discrimination, exempting one corporation from contributing its proper proportion of public taxes, in violation of Article 15 of the Declaration of Rights of the Maryland Constitution, requiring equality in taxation. Baltimore vs. Williams, 61 Fed. (2d) 374; Baltimore City vs. Starr Church, 106 Md. 281; Baltimore vs. Cahill, 126 Md. 596; Wells vs. Hyattsville, 77 Md. 125; Maxwell vs. State, 40 Md. 273; Prince George's County vs. Laurel, 70 Md. 443; Curtis vs. Mactier, 115 Md. 386; Schley vs. Lee, 106 Md. 390 12

(3) It is a special Act exempting one corporation from the operation of the general law of the State, in conflict with Article 3, Section 33 of the Maryland Constitution. Baltimore vs. Williams, 61 Fed. (2d) 374; Baltimore City vs. Starr Church, 106 Md. 281; Baltimore City vs. Allegany County, 99 Md. 1; Littleton vs. Hagerstown, 150 Md. 163; Prince George's County vs. B. & O. R. R. Co., 113 Md. 179; Crisfield vs. C. & P. Telephone Co., 131 Md. 444; Westminster vs. Cons. Public Utilities Co., 132 Md. 374 63

(4) Its title is defective and misleading in failing to designate the Act as an amendment or addition to Article 81, Section 7 of the Annotated Code of Maryland, contrary to the requirements of Article 3, Section 29 of the Maryland Constitution. Weber vs. Probey, 125 Md. 544; Kafka vs. Wilkinson, 99 Md. 238 75

(5) It is an arbitrary selection of one corporation for the enjoyment of a special favor, denying the equal protection of the law guaranteed by the Fourteenth Amendment of the Federal Constitution. Gulf, Colorado and Santa Fe Ry. Co. vs. Ellis, 165 U. S. 150; Louisville Gas & Electric Co. vs. Coleman, 277 U. S. 32; Quaker City Cab Co. vs. Pennsylvania, 277 U. S. 389; Royster Guano Company vs. Virginia, 253 U. S. 412; Michigan Central Railroad vs. Powers, 201 U. S. 245; Baltimore vs. Williams, 61 Fed. (2d) 374; Baltimore City vs. Starr Church, 106 Md. 281; Baltimore vs. Cahill, 126 Md. 596; Kelman vs. Ryan, 163 Md. — 78

B. PAYMENTS DUE UNDER FRANCHISE ORDINANCE NOT WITHIN THE PURVIEW OF CHAPTER 497.

Moneys due the City of Baltimore under Franchise Ordinance 123 (1906) as compensation for the use of the City streets, are payments made under a contract between the City of Baltimore and the Railroad Company, and are not within the scope of the attempted exemption of the railroad property of the Railroad Company from taxes and charges in the nature of a tax. United States vs. La Franca, 282 U. S. 568; Baltimore vs. Williams, 61 Fed. (2d) 374; 26 R. C. L. 13; St. Louis vs. Western Un. Tel. Co., 148 U. S. 92; Baltimore Union Passenger Ry. Co. vs. Baltimore, 71 Md. 405; Park Tax Cases, 84 Md. 1; Baltimore vs. United Railways Co., 107 Md. 250; United Railways vs. Baltimore, 111 Md. 264..... 86

C. IF PAYMENTS UNDER FRANCHISE ORDINANCE BE CONSTRUED AS WITHIN ITS SCOPE, THEN CHAPTER 497 FURTHER VIOLATES THE FEDERAL AND MARYLAND CONSTITUTIONS.

Chapter 497 is unconstitutional and void because:

(1) It embraces more than one subject, i. e., taxes and charges under franchise ordinances as compensation for the use of the streets, which are not described in its title, in violation of Article 3, Section

29. Baltimore vs. Williams, 61 Fed. (2d) 374; State vs. The Schultz Co., 83 Md. 58; Luman vs. Hitchens Bros. Co., 90 Md. 14; Painter vs. Mattfeldt, 119 Md. 466; Weber vs. Probey, 125 Md. 544; Culp vs. Commissioners of Chestertown, 154 Md. 620..... 95

(2) It restricts and limits, in a manner prohibited by the Home Rule Amendment of the Maryland Constitution, Article 11-A, the unrepealed Charter powers of the City of Baltimore and destroys the property rights of the City of Baltimore acquired through the exercise of these Charter powers. State vs. Stewart, 152 Md. 419..... 99

(3) It results in an impairment of the obligation of contracts protected by the Federal Constitution as it violates property and contract rights acquired by the City of Baltimore in the exercise of a distinctive private proprietary capacity conferred upon the City by the State of Maryland. Boston vs. Jackson, 260 U. S. 309; Commissioners vs. Lucas, 93 U. S. 108; Mount Hope Cemetery vs. Boston, 158 Mass. 509; Adams vs. Plunkett, 274 Mass. 453; Hunter vs. Pittsburgh, 207 U. S. 161; State vs. Stewart, 152 Md. 419... 105

ARGUMENT.

A. *Chapter 497 Violates the Constitution of the United States and the Constitution of Maryland.*

I.

RULES OF CONSTRUCTION APPLICABLE IN DETERMINING CONSTITUTIONALITY OF CHAPTER 497.

The Maryland Court of Appeals is emphatic and unyielding in its application of the rule of law that exemptions from taxation must be strictly construed. This doctrine is clearly expressed in Havre de Grace vs. Bridge Company, 145 Md. 491, the Court saying, pages 494-495:

> "• • • it is an unyielding rule of law, that exemptions claimed under legislative acts, should be rigidly

> construed and established beyond reasonable doubt. • • • The taxing power is never presumed to be surrendered, and therefore every assertion that it has been relinquished must, to be efficacious, be distinctly supported by clear and unambiguous legislative enactment. To doubt is to deny the exemption. • • • Every reasonable intendment must be made that it was not the design to surrender the power of taxation or to exempt any property from its due proportion of the burden of taxation."

The rigidity with which this rule of construction is applied is demonstrated by the case of Knights of Pythias vs. Baltimore, 157 Md. 542.

This rule of construction is as broad as the subject to which it relates, and is as applicable to the question of the power of the Legislature where a restriction is imposed upon the Legislature by the fundamental law of the State, as it is to the determination of the import and extent of an exemption from taxation granted by an Act of the Legislature when the power of the latter is conceded.

In Berryman vs. Whitman College, 222 U. S. 334, pages 350-351, it was said:

> "It is conceded that the elementary rule is that exemptions from taxation must be strictly construed. But it is said that this applies only to the contract of alleged exemption, and has no relation to the inquiry whether the legislature had the power to exempt, because full legislative power must be presumed to exist unless there be a plain prohibition to the contrary. While we are of opinion that the contention has no direct bearing on the more important proposition here to be decided, we cannot give it, even by silence, our assent, because we consider that it admits, on the one hand, the rule of strict construction and at once denies it upon the other, by improperly

restricting the area of the operation. We say this because *if, in a particular case, the duty arises of determining whether words of restriction found in the fundamental law are intended to operate a limitation on the legislative power to grant contract exemptions from taxation, the rule of strict construction is just as applicable as it would be to a case where it was applied for the purpose of determining whether the particular terms of an alleged contract did or did not embrace an exemption from taxation. We think the rule of construction is as broad as the subject to which it relates and its operation does not depend upon whether the question is one of limitation of legislative power or of the true interpretation of a contract asserted to be one of exemption.''**

The power of the Legislature of Maryland to grant exemptions from taxation is restricted by the Constitution of Maryland and this restriction is mandatory.

It is necessary, therefore, to approach the consideration of the constitutionality of Chapter 497 in the light of the foregoing decisions and to apply the well established rule of strict construction to the power of the Legislature to enact such an exemption from taxation as contained in Chapter 497. The granting of the exemption by Chapter 497 is in derogation of the sovereign power of the State of Maryland and is explicitly prohibited by the Constitution of Maryland.

II.

CHAPTER 497 IS REPUGNANT TO ARTICLE 15 OF THE DECLARATION OF RIGHTS OF THE MARYLAND CONSTITUTION.

1. HISTORY, OBJECT AND PURPOSES OF ARTICLE 15.

The people of Maryland in creating a form of government for the State of Maryland retained to themselves by a Declaration of Rights certain inalienable rights and

* All italics in quotations in this brief our own.

privileges, and imposed thereby restrictions and limitations upon the legislative power of the State government.

Article 15 of the Declaration of Rights, the most important article in the whole Declaration of Rights (Niles on Maryland Constitutional Law, page 24), has been a part of the fundamental law of Maryland since November 3, 1776, its predominant object being to provide for equality in taxation, to prevent the burden of supporting the government from falling upon some individuals to the exclusion or exemption of others and to prohibit unjust discrimination.

This fundamental declaration of rights of the citizens of Maryland against unequal taxation and arbitrary discrimination is a positive limitation and restriction of the power of the State Legislature.

The Declaration of Rights of the Maryland Constitution provides:

> "We, the people of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration the best means of establishing a good Constitution in this State for the sure foundation and more permanent security thereof, declare:
>
> • • • • • • •
>
> Art. 15. That the levying of taxes by the poll is grevious and oppressive and ought to be prohibited: that paupers ought not to be assessed for the support of the Government; *that the General Assembly shall, by uniform rules, provide for separate assessment of land and classification and sub-classifications of improvements on land and personal property, as it may deem proper; and all taxes thereafter provided to be levied by the State for the support of the general State Government, and by the counties and by the City of Baltimore for their respective purposes, shall*

be uniform as to land within the taxing district, and uniform within the class or sub-class of improvements on land and personal property which the respecting taxing powers may have directed to be subjected to the tax levy; yet fines, duties or taxes may properly and justly be imposed, or laid with a political view for the good government and benefit of the community."

Prior to the amendment by Chapter 390 of the Acts of 1914, ratified November 2, 1915, Article 15 provided:

"That the levying of taxes by the poll is grevious and oppressive, and ought to be prohibited; that paupers ought not to be assessed for the support of the Government; *but every person in the State, or person holding property therein ought to contribute his proportion of public taxes for the support of the Government, according to his actual worth in real or personal property;* yet fines, duties or taxes may properly and justly be imposed, or laid with a political view for the good government and benefit of the community."

Although the present phraseology of Article 15 is different from the phraseology that prevailed in this Article from 1776 to 1915, the intent and purpose of the original language are implicit in the new amendment.

The Court of Appeals of Maryland so expressed itself in Susquehanna Power Company vs. Tax Commission, 159 Md. 334, wherein it said, page 343:

"Although the phrase of the Maryland Bill of Rights, stating the just and salutary principle that 'every person in the State, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property', was omitted from the article as amended by chapter 390 of the Acts of 1914, ratified November

2nd, 1915, yet it is implicit in the following language of the article as amended; 'And all taxes thereafter provided to be levied by the State for the support of the general State Government, and by the counties and by the City of Baltimore for their respective purposes, shall be uniform as to land within the taxing district, and uniform within the class or sub-class of improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy.' "

The Maryland Court of Appeals has consistently upheld the objects and purposes of Article 15, and has with forceful determination stricken down all tax exemption statutes of the Legislature in conflict therewith. Baltimore City vs. Starr Church, 106 Md. 281; Baltimore vs. Cahill, 126 Md. 596; Wells vs. Hyattsville, 77 Md. 125; Maxwell vs. State, 40 Md. 273; Prince George's County vs. Laurel, 70 Md. 443; Curtis vs. Mactier, 115 Md. 386; Schley vs. Lee, 106 Md. 390. See also: State vs. C. & P. R. R. Co., 40 Md. 22; State vs. P. W. & B. R. R. Co., 45 Md. 361; State vs. No. Central Ry. Co., 44 Md. 131; Susquehanna Power Co. vs. State Tax Commission, 159 Md. 334.

In the leading case of Baltimore City vs. Starr Church, 106 Md. 281, the Court, in expressing the object and purpose of Article 15, said, pages 284-285:

"This provision has, with a slight but not material change of phraseology, been a part of the organic law of Maryland for considerably more than a century. *Its predominant object is to provide by a fixed enactment equality in taxation, and to prevent, as far as possible, the burden of supporting the government from falling upon some individuals to the exclusion or exemption of others. It prohibits unjust discriminations, and whilst it remains in force the land owner, be his possession large or small, will have an*

absolute and complete guarantee that public taxes cannot be imposed upon him while others who are equally responsible in the law may have themselves relieved of this burden by the partiality of legislative enactment, without sub-serving any public policy. Its theory is that the distribution of the burden over every class of property alike, will lessen the proportion of each individual's contribution, whereby oppressive exactions from the owners of any particular class of property will be impossible. This has been the uniform and consistent principle always followed in Maryland; eminently just in itself as a sound and long accepted axiom of political economy, it has been incorporated in her organic law since November 3rd, 1776; it has been upheld by her Courts and steadily and tenaciously adhered to by her conservative people."

In State vs. Cumberland and Penna. Railroad Co., 40 Md. 22, the Court, in declaring an Act of the Legislature unconstitutional and void as being in violation of Article 15, said, in referring to this Article:

"This is a fundamental declaration of the right of the citizen against unequal and undue assessments of taxes by the Government. It was not deemed a sufficient guarantee that no tax should be imposed but by the representatives of the citizen in the Legislature, but, in order to prevent abuse of the power, which would otherwise be unlimited, the Legislature is required to cause all public taxation for the support of the Government to be fair and equal in proportion to the value of the property assessed, so that no class or species of property shall be unequally or unduly taxed. *And this declaration of the right of the citizen is not simply directory to the Legislature, to be observed or not as that department of the Government may determine or think proper; but it is a positive limitation or restriction on the power, and whenever it is transcended or disregarded, it becomes the duty of the courts to declare the Act void.* Hence,

this court has repeatedly declared that taxes, if imposed in violation of this fundamental rule, would be illegal and void."

In State vs. P. W. & B. R. R. Co., 45 Md. 361, at page 377, the Court, in declaring the object of Article 15, said:

> "That every one should contribute his proportion of the public burdens, according to the measure of his ability, and that all taxes levied upon property for the support of the government, should so far as it is practicable, be equal and uniform, may be considered as a principle underlying the American system of taxation. It was to give an authoritative recognition of a principle so just and impartial, and which challenges universal assent, that the framers of the Constitution of 1776, made it a part of the organic law of the State."

2. CASES INTERPRETING ARTICLE 15.

The law of Maryland relating to the constitutionality of exemptions from taxation was conclusively and finally settled by the case of Baltimore vs. Starr Church, 106 Md. 281, decided in 1907, wherein the Court of Appeals in a forceful and convincing opinion declared unconstitutional and void an Act of the Legislature of 1904 attempting to exempt certain wharf property (which was revenue producing) of a religious corporation. It has been the long continued practice of the State of Maryland to exempt the property of religious organizations devoted to public worship, together with the property of hospitals, asylums, charitable and benevolent institutions because these institutions are affected with a profound public interest, perform services beneficial to the public and are devoted to the public welfare. In all these instances, exemptions are provided for by general law and apply to 'asses as designated above.

Despite, however, this long-established policy of encouraging the activities of these institutions by exempting their property used for their respective purposes, and despite the preferred position they hold in Maryland jurisprudence as eleemosynary corporations, the Court of Appeals in vigorous language denounced the exemption of the wharf property herein referred to as null and void and in violation of Article 15. The Court, after setting forth the object and purpose of Article 15 hereinbefore quoted, declared, page 285:

> "By the *Act of 1904* not only under the construction placed upon it by the appellee but palpably *by reason of its exemption attempts to overthrow this salutary principle and to disregard Art. 15 of the Declaration of Rights, and to substitute a novel and experimental scheme, which if suffered to obtain a foothold will inevitably lead to ruinous consequences. If the Legislature may lawfully do this in this particular instance, why not in another and another, until there would be an almost indefinite number of exemptions, and we think such Acts should be stricken down as null, and inoperative, repugnant to the organic law, and prolific of obvious abuses.*"

The Court, recognizing the power of the Legislature to exempt certain classes of property, said, page 286:

> "It will not be denied at this late day that the Legislature has the power, within reasonable limits, to exempt certain species or classes of property from taxation, when the public interests so require."

The Court held, however, that no classification at all had been made in the case under consideration, and continued, page 287:

> "The exemption does not apply to a species or class of property, but to one piece of property only, leaving all other property of the same class or spe-

cies subject to taxation; and for no other reason except the purely arbitrary one of a benefit or personal favor to the appellee and no one else. * * * So that where the revenue-producing property of all other churches continues taxable, and the revenue-producing property of this church is made exempt, such exemption can be nothing else than an arbitrary discrimination between the property of the appellee and all other property of the same species or kind owned by similar corporations, and such an arbitrary exemption must be void under Art. 15 of Declaration of Rights.

Not only is it unlawful for the Legislature to exempt one man's property and tax another of exactly the same kind, but the Legislature may not impose a tax upon the property of another at a different rate. A fortiori the Legislature should not tax the revenue-producing property of all churches except one, and for this prescribe, not a different rate, but no rate at all; in other words exemption. State v. P. W. & B. R. R. Co., 45 Md. 361. * * *

It is simply an arbitrary selection of the property of the appellee, and the conferring of a favor upon it, which is denied all other owners of similar property. *If this can be done in one case it can be done in another, and it would then be in the power of the Legislature to willfully discriminate between its citizens, taxing some on account of their property, and at the same time exempting others similarly situated, and all while acting under no reasonable, just or proper rule whatever, but solely at the dictation of its own caprice."*

It is manifest from the language employed in the Starr Church case that the Court was concerned with the possibility of the destruction of the entire system of taxation of Maryland as contemplated by the Maryland Constitution and of the ruinous consequences upon the taxable basis if the Legislature were unrestrained in granting exemptions, and it determined to demand equality and

uniformity in taxation and to prevent an unfair, unjust and discriminatory burden being placed upon the taxpayers not enjoying exemption from taxation. The Starr Church case has for this reason become a landmark in Maryland jurisprudence.

This intent to prevent the destruction of the equality prescribed by the fundamental law and the unwarrantable reduction of the taxable basis was demonstrated in the earlier case of Wells vs. Hyattsville, 77 Md. 125, wherein the Court, invoking Article 15, declared Chapter 285 of the Acts of 1892 applicable to Hyattsville, Prince George's County, unconstitutional by reason of its exemption of all personal property from taxation, the Court saying, at page 140:

> *"Under the pretext of granting exemptions different classes of property cannot be successively stricken from the tax lists, so as to destroy the equality prescribed by the fundamental law, and eventually to reduce the taxable basis to one kind of property alone. Reducing the taxable basis to land by first excluding personal property altogether, and then excepting buildings and improvements, is a perversion and not a legitimate exercise of the conceded authority to make valid exemptions. If this be not so, then the very power to exempt might be carried to the length contended for, and if carried that far it would effectually abrogate Art. 15 of the Declaration of Rights."*

In Baltimore vs. Cahill, 126 Md. 596, the Court declared unconstitutional Chapter 470 of the Acts of 1914, which attempted to exempt the property of the owners benefited by the opening of the first two sections of Key Highway in Baltimore City from assessments for benefits for public improvements, the Court saying (page 602) that the effect of the Act "is to create an arbitrary

and unreasonable exemption from taxation and is not based upon a proper or reasonable classification," and that (page 603) "it makes a discrimination in favor of the owners of property abutting upon this street which is denied to the owners of property abutting upon every other street in Baltimore City which has been or which may hereafter be opened. * * * (page 604) It does not relate to a species, but to particular individuals of a class."

In Schley vs. Lee, 106 Md. 390, where the statute provided for deduction of the value of Baltimore City stock in assessing the value of shares of a corporation holding same, but made no such provision in the case of an individual, the Tax Commissioner was restrained from making such deduction as being unconstitutional, the Court saying, page 402:

> "A further, and from a legal standpoint more serious, result that would follow the adoption by the Tax Commissioner of his proposed plan of assessing this company's assets would be an unjust and unlawful discrimination between the liability of Baltimore City stock and like securities to taxation when held by a private person and their practical exemption from that liability when held by a corporation. Such result as that involves a violation of the basic principle of equality and uniformity of taxation, asserted by Article 15 of the Declaration of Rights, which cannot be viewed with the slightest degree of toleration by this Court. The power of the Legislature, when State policy and the public interest require it, to exempt within reasonable limits certain classes of property from taxation has been recognized by numerous decisions of this Court but it has always been held that the power cannot be so exercised as to destroy the equality prescribed by the fundamental law. Wells v. Hyattsville, 77 Md. 140; Prince George's Co. v. Laurel, 70 Md. 443; Simpson v. Hopkins, 82 Md. 478."

And in Baltimore vs. Williams, 61 Fed. (2d) 374, the United States Circuit Court of Appeals for the Fourth Circuit, in declaring Chapter 497 of the Acts of 1931 unconstitutional and void, said, page 379:

> "And we think that the act clearly violates the uniformity clause of Article 15 of the Declaration of Rights of the Constitution of Maryland. • • •
>
> Article 81, Section 6, Paragraphs (1) and (2) of the Annotated Code of Maryland, 1929 Supplement, provides that all real and tangible personal properties in the state, by whomsoever owned, shall be subject to assessment to the owner and taxation for ordinary taxes in the state and in the county and city in which the same are situate. Under this provision, real and tangible personal property of railroad companies is subject to taxation just as the property of other individuals and corporations. The effect of the act in question is to create a special exemption from this tax in favor of the property of this particular railroad company. *It would seem to require no argument to demonstrate that a law which exempts the property of one man from taxation while taxing the property of another in the same class violates the uniformity provision of the Constitution which we have quoted, and the courts of Maryland so hold.* Baltimore City v. Starr Church, 106 Md. 281, 67 A. 261; Schley v. Lee, 106 Md. 390, 67 A. 252; Wells v. Hyattsville, 77 Md. 125, 26 A. 357, 20 L. R. A. 89. And see Susquehanna Power Co. v. Tax Commission, 159 Md. 334, 343, 151 A. 29."

The well established and frequently restated construction given to Article 15 of the Declaration of Rights of the Maryland Constitution by the highest judicial tribunal of Maryland in the specific cases herein referred to permits of no other interpretation but that Chapter 497 of the Acts of 1931 is repugnant to the said provision of the Maryland Constitution. The Act declared unconstitutional in the Starr Church case, supra, is practicallly

identical to the statute under consideration in the instant case and, therefore, the applicability of the constitutional interpretation adopted in that case to the instant case is manifest. Since the interpretation of Article 15 is clearly established in Maryland, it is conclusive of the issue presented in this case under the rule adopted by this Honorable Court in Old Colony Trust Co. vs. Omaha, 230 U. S. 100, wherein this Court held, page 116, that the decisions of the highest Court of a State relating to such matters of local law as the construction of the State Constitution are controlling upon this Court so long as their application involves no infraction of rights secured by the Constitution of the United States. See also Collins vs. Johnston, 237 U. S. 502, 508, 509, and 6 R. C. L., page 85.

3. TEST OF CONSTITUTIONALITY OF TAX EXEMPTION IMPOSED BY MARYLAND COURT OF APPEALS AS APPLICABLE TO CHAPTER 497.

In the Starr Church case, supra, page 286, the Court laid down certain tests by which the constitutionality of a tax exemption statute could be determined, the Court saying:

> "When State policy and considerations beneficial to the public justify it, exemptions within reasonable limits, may be made. 1. When public policy justifies it. 2. The exemption must be within reasonable limits. 3. The property which may be exempted is same species of property."

(1) *Does public policy justify the exemption provided for by Chapter 497?*

The purpose and intent of this exemption is confined solely to the relief and benefit of one corporation. Public policy does not justify such favoritism. Baltimore vs. Starr Church, supra.

Moreover, it is now a well established policy of the State of Maryland to assess and tax railroad property, real and personal, for county and municipal purposes in the same manner as the property of individuals is assessed and taxed. This policy was first expressed by a public general law of the State of Maryland in Chapter 159 of the Acts of 1876, and since that date has been a part of the public general laws of Maryland. See Code of 1888, Article 81, Section 155; Code of 1904, Article 81, Section 189; Bagby's Annotated Code 1911, Article 81, Section 193; Bagby's Annotated Code 1924, Article 81, Section 204; 1929 Supplement to Bagby's Annotated Code of 1924, Article 81, Section 6, Paragraphs 1 and 2, and Section 7, Paragraph 16.

This well established public policy finds judicial confirmation in State vs. Northern Central Ry. Co., 44 Md. 131, and B. C. & A. Ry. Co. vs. Wicomico County, 103 Md. 277.

In State vs. Northern Central Ry. Co., 44 Md. 131, page 168, the Court said:

> "Not only does the Act of 1866, subject to taxation all property in the State, and repeal in general terms all exemptions heretofore granted, but the Act of 1870, ch. 362, provides that all and any provision contained in the charter, or supplements thereto, of any railroad company, whereby its stock or property is exempted from taxation, be, and the same is hereby repealed; and by the 2nd section, such stock and property is subjected to taxation, for State, county and municipal purposes, in the same manner, as the stock and property of other corporations.
>
> *The intention of the Legislature to subject all property in the State to taxation, and to repeal all exemptions granted to railroad companies, is thus expressed in language, plain and unambiguous, and the effect and operation of these Acts can admit of but one construction.*"

The United States Circuit Court of Appeals attempted to interpret the policy of the State of Maryland in reference to the granting of tax exemptions to railroads in the case of Wicomico County vs. Bancroft, 135 Fed. 977, in the following language, at page 980:

> "There is a general inclination on the part of State Legislatures to grant immunities to railroads and other corporations with the view of encouraging the development of the particular section of country through which they are to be constructed. To undertake to build a short line of railroad in most sections of the country is a precarious one to say the least of it and in the absence of aid by subscription or immunity from taxation, instances are very rare, where individuals are willing to embark in such hazardous enterprises. In the present case the Legislature of Maryland seemed to adopt this policy, and in order to secure the construction of a road granted certain privileges, franchises and immunities to the Baltimore and Eastern Railroad Company for a period of thirty years. * * *"

The Maryland Court of Appeals in B. C. & A. Ry. Co. vs. Wicomico County, 103 Md. 277, quoting the above language of the Circuit Court of Appeals, refused to accept this interpretation of Maryland policy, saying, page 285:

> "Furthermore this State had distinctly declared its policy in reference to the local taxation of railroad property, by legislative enactment which was in full force in August, 1894, when the appellant was incorporated, and still remains unrepealed. Sec. 155 of Art. 81 of the Code of 1888 provides that 'the property real and personal of each and every railroad company in this State shall be assessed and taxed for county and municipal purposes in the same manner in which the property of individuals is now taxed'."

It is interesting to note that the Circuit Court of Appeals' decision in 135 Fed. 977, was reversed by the Supreme Court of the United States in Wicomico County vs. Bancroft, 203 U. S. 112, wherein the Supreme Court of the United States agreed with the reasoning expressed by the Court of Appeals of Maryland in the 103 Md. case, supra.

A further manifestation of this policy of the State of Maryland to make all property in the State subject to taxation and to repeal and nullify all exemptions from taxation not embodied in the general laws of the State is evidenced by an amendment to Article 3, Section 48 of the Constitution, ratified by the people of Maryland November 3, 1891.

The salient feature of the amendment was the provision that the General Assembly shall not alter or amend the charter of any corporation existing at the time of the adoption of the amendment or pass any other general or special law for the benefit of such corporation except upon the condition that such corporation should surrender all claim to exemption from taxation to which it may be entitled under its charter or otherwise. Niles on Maryland Constitutional Law, page 206.

Article 3, Section 48, provides:

> "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes and except in cases where no general laws exist, providing for the creation of corporations of the same general character as the corporation proposed to be created, and any act of incorporation passed in violation of this section shall be void; all charters granted or adopted in pursuance of this section, and all charters heretofore granted and created subject to repeal or modifica-

tion, may be altered from time to time, or be repealed; provided, nothing herein contained shall be construed to extend to banks or the incorporation thereof; *the General Assembly shall not alter or amend the charter of any corporation existing at the time of the adoption of this article, or pass any other general or special law for the benefit of such corporation except upon the condition that such corporation shall surrender all claim to exemption from taxation or from the repeal or modification of its charter, and that such corporation shall thereafter hold its charter subject to the provisions of this Consitution; and any corporation chartered by this State which shall accept, use, enjoy or in anywise avail itself of any rights, privileges, or advantages that may hereafter be granted or conferred by any general or special act, shall be conclusively presumed to have thereby surrendered any exemption from taxation to which it may be entitled under its charter, and shall be thereafter subject to taxation as if no such exemption has been granted by its charter.*"

In Louisville & Nashville R. R. Co. vs. Palmes, 109 U. S. 244, this Court held an exemption from taxation granted by the Legislature of Florida to a specific railroad company unconstitutional and void as unauthorized and prohibited by the State Constitution. This case is directly in point as the Act declared unconstitutional therein contravened the express public policy of the State contained in its Constitution.

(2) *Exemption must be within reasonable limits.*

The exemption provided for by Chapter 497 is not within reasonable limits because it is absolutely arbitrary. Starr Church case, supra. It exempts the Railroad Company from contributing its proportion of public taxes according to its actual worth in real and personal property. It is the selection of one corporation for relief from all taxes solely because said corporation is in financial diffi-

culties. If any or all corporations or individuals in financial difficulties were relieved from taxation under the present economic conditions, the burden of those not exempt would be unequal and illegal. If this exemption is based upon the Railroad Company being a public utility, rendering a quasi-public function, exemptions could be extended by the Legislature to every public utility in the State. There would be no limit imposed upon the Legislature in granting such exemptions if this Act be deemed constitutional. The Legislature, as the Court said in the Starr Church case, supra, would be attempting to "substitute a novel and experimental scheme, which if suffered to obtain a foothold will inevitably lead to ruinous consequences." Such a scheme would abrogate the sound and salutary principles of Article 15, destroy equality of taxation in Maryland and undermine the entire taxable basis, thereby placing an insufferable burden upon those property owners not enjoying exemption.

(3) *Property exempted must be same species.*

This exemption does not apply to a species or class of property, but to the property of one corporation only, leaving all other property of the same class or species subject to taxation, the only reason for the exemption being the purely arbitrary one of a benefit or personal favor to the Railroad Company and no one else.

The Act makes no attempt at classification. An exemption is granted to one corporation by name. This is the intent and purpose of the Act. The language is plain and unequivocal. The scope of the law is definitely expressed on its face; there is no room for construction except as to its constitutionality. United States vs. Reese, 92 U. S. 214, 221.

By no figment of imagination could Chapter 497 be construed as granting exemption to a class or even to a sub-class. As it is said in 1 Willoughby on the Constitution of the United States, 2nd Edition, page 34:

> "Where, however, the scope of the law is plainly expressed, and as such is unconstitutional, the court will not resort to a strained or arbitrary interpretation in order to render the law valid."

Under the decisions of the highest Court in Maryland, hereinbefore referred to, holding that exemptions from taxation must be based upon a proper and reasonable classification, Chapter 497 could only be interpreted as constitutional by this Honorable Court making by judicial construction a law which the Legislature of Maryland did not make, and implying a classification when none exists in the Act itself. This Honorable Court has refused to embark upon such judicial legislation. Trade-Mark Cases, 100 U. S. 82, 99; United States vs. Delaware and Hudson Co., 213 U. S. 366, 405; see also 6 R. C. L. 79.

Since Chapter 497 attempts to grant an exemption to a single corporation and not to a class, it is unconstitutional and void. Baltimore vs. German-American Fire Ins. Co., 132 Md. 380. In this respect, Chapter 497 of the Acts of 1931 is identical to the Act held unconstitutional in the Starr Church case, supra. Therefore, so far as the law of Maryland is concerned, the instant case comes within the operation of the doctrine of *stare decisis* and for this reason alone the decision of the Circuit Court of Appeals should be affirmed.

The Circuit Court of Appeals, in holding the statute in the instant case unconstitutional (61 Fed. (2d) 374, 378), said:

> "Here, there is no classification, but an arbitrary exemption is granted to a single taxpayer. * * * We have no attempt at classification, but an arbitrary, individual exemption."

As a result of the exemption contained in Chapter 497, the railroad station and terminal for said corporation and its real property in the form of rights of way, etc., are exempt from taxation, while such property of other railroad corporations in Baltimore City continues taxable. Moreover, all other real estate, except that exempted under the general tax laws of Maryland contained in Article 81, Section 7, continues taxable. And moreover, the franchise for the use of the streets of Baltimore of one public utility is exempted from taxation while such franchise rights of other public utilities are subject to taxation. Furthermore, it exempts from State, County and Municipal taxation the real and personal property of one transportation company while all other transportation companies, whether transporting by rail, water, public highways or air, are subject to taxation. And, although the Railroad Company exempted is insolvent, an exemption is not granted to other insolvent taxpayers or even to other insolvent railroads.

Therefore, under the test of constitutionality imposed by the Starr Church case, the exemption provided for by Chapter 497 of the Acts of 1931, is unconstitutional. It is an arbitrary and unfair discrimination against every other taxpayer in Baltimore City, against all other real property owners in Baltimore City, against every other public utility in Baltimore City, against every other transportation company in Baltimore City or the State of Maryland, against every other interstate carrier in the State of Maryland passing through Baltimore City, against every other inter-urban railway in the State of

Maryland and against the street railway in Baltimore City. It denies Baltimore City a revenue from taxation justly due and owing, and increases the burden of taxation of every other taxpayer in Baltimore City. This exemption Act is unquestionably an abuse of power by the Legislature. It creates a condition that contravenes every conception of public policy established in this State by judicial decision and public general laws. It can be justified on no grounds of public policy whatsoever. It is repugnant to the letter and spirit of the fundamental law of Maryland, and, in fact, abrogates the protection the people of Maryland established for themselves by means of Article 15 of the Declaration of Rights. It ignores the organic concept underlying the American system of taxation, i. e., equality and uniformity in taxation. It experiments with a new and novel scheme of taxation exemption, unjustified in principle and vicious in practice. The ruinous consequences of such rank favoritism would be to undermine the whole theory of taxation prevailing in the State of Maryland, and if carried to its logical conclusion, would completely destroy the taxable basis of the State of Maryland and the City of Baltimore.

The latest decision of the Maryland Court of Appeals on the question of arbitrary and unreasonable discrimination is the case of Kelman vs. Ryan, decided January 3, 1933, wherein the Court said:

> "It is recognized and established by the Courts of this country, both Federal and State, that the Legislature may, under conditions, create classes and subject all persons coming within the classificatoins to burdens or duties not imposed upon individuals outside of the classes, or may confer rights and privileges upon those within the classes that are not enjoyed by others not embraced therein. These classifications, however, must not be arbitrary or unreasonable, but must rest upon some difference which

bears a reasonable and just relation to the act—the thing—in respect of which the classification is proposed. Or as otherwise stated, '*a statute which denies to one person the protection that is accorded to others under the same conditions and in the like situation, or which imposes on one person a burden not similarly borne by others is in both instances invalid under the paramount organic law because of its discrimination.*' Luman vs. Hitchens Bros. Co., 90 Md. 14; State vs. Potomac Coal Co., 116 Md. 401; Clark vs. Harford Agri. & Breed. Assn., 118 Md. 621; Storck vs. Baltimore City, 101 Md. 486; Criswell vs. State, 126 Md. 108; Keller vs. State, 122 Md. 684; Watson vs. State, 105 Md. 657; Kenneweg vs. Allegany County, 102 Md. 127; Hayes vs. Missouri, 120 U. S. 68 (L. Ed. 578); Barbier vs. Connolly, 113 U. S. 27 (L. Ed. 923); St. Louis & San Francisco Railway Company vs. Mathews, 165 U. S. 1 (L. Ed. 611); 12 Corpus Juris 1146; Cooley on Constitutional Limitations 249."

4. THE MARYLAND COURT OF APPEALS HAS NOT APPROVED DIRECTLY OR BY INFERENCE OR IMPLICATION THE STATUTORY EXEMPTION OF AN INDIVIDUAL RAILROAD FROM TAXATION.

The Petitioner contends that the General Assembly of Maryland had the power to grant the exemption from taxation contained in Chapter 497 of the Acts of 1931, claiming that the Maryland Court of Appeals has by inference or implication upheld similar Acts exempting other railroads.

To support this contention, the Petitioner relies mainly upon two lines of cases, one involving the Baltimore and Ohio Railroad, Baltimore vs. B. & O. R. R. Co., 6 Gill, 288; State vs. B. & O. R. R. Co., 48 Md. 49; State vs. B. & O. R. R. Co., 127 Md. 434; and the other the B C. & A. Railway Company cases, B. C. & A. Ry. Co. vs. Ocean City, 89 Md. 89; B. C. & A. Ry. Co. vs. Wicomico

County, 93 Md. 113; B. C. & A. Ry. Co. vs. Wicomico County, 103 Md. 277.

The B. & O. cases are easily distinguishable from the case at bar, in that the exemption therein considered was a contract exemption and an integral part of the original charter of the Baltimore and Ohio Railroad. The first two of these cases involve the interpretation of the extent and scope of the exemption granted in the Act of incorporation of the B. & O. (Acts of 1826, Chapter 123) and the question whether this exemption could be repealed or modified by subsequent action of the State of Maryland. It was held that the exemption was a contract protected by the Federal Constitution and could not be impaired by the State of Maryland by subsequent legislation. This exemption rested upon a material consideration, i. e., the construction and operation of a new enterprise, a line of railroad, in which the State of Maryland itself was finacially interested. The purpose of this exemption in the Act of 1826 is set forth in 6 Gill, 288, at page 296, as follows:

> "The design contemplated by the Legislature in the insertion of this clause of exemption in the Act of Assembly, was to confer a certain substantial, not a nominal benefit, on the stockholders, and to *induce capitalists to risk their money in a novel and hazardous enterprise.* * * *
>
> It is a matter of notoriety and of history, that in chartering the Baltimore and Ohio Railroad Company, the Legislature and the people of Maryland regarded the completion of the work as a great State object, tending eminently to promote the future wealth and prosperity of Maryland, and particularly of the City of Baltimore, and to contribute to the permanence of the Union of the United States. They also were duly sensible that this gigantic and patriotic undertaking could not be accomplished but at

great expense and hazard of pecuniary loss to its undertakers. As an encouragement to the enterprise they were willing to confer on it every immunity, privilege and exemption which could reasonably be required, and tend to its completion."

Moreover, the following language of the Court on page 298, evidences the extent to which the State itself was financially interested in the enterprise:

"By this enactment (Act of 1835, Ch. 395), it was certainly not the design of the Legislature to impair the ability of the Baltimore and Ohio Railroad Company, to comply with its stipulation of paying the six per cent. interest on the $3,000,000 of State bonds, issued for the benefit of the Company. It was not intended to confer new powers, not before possessed by the State, but to pledge the faith of the State to capitalists who might become purchasers of its bonds, that the powers of taxation already possessed by the State, should, if necessary, be exerted for their benefit, and not to their prejudice. *Nobody*, at the passage of the Act of 1835, then *doubted but that the receipts of the State from the profits of the Railroad Company, would be greater than any amount of taxes it could derive from the shares of stock or property of the Company, when subjected to such taxation*, according to the thirteenth Article of the Declaration of Rights. And, consequently, it is apparent that the abrogation of the exemption contended for, would have depressed rather than enhanced the value of the State bonds."

The case of State vs. B. & O. R. R. Co., 48 Md. 49, confirmed the earlier case in 6 Gill. The Court said, page 73:

"We must bear in mind that the appellee was incorporated in 1826, and was in fact, the first railroad ever chartered in this country for the transportation of freight and passengers. It was to extend from Baltimore to the Ohio River, a distance

> of 379 miles, involving necessarily in its construction an enormous sum of money, and was therefore justly considered not only as a gigantic, but in a pecuniary sense a hazardous enterprise. Under these circumstances, the Legislature was willing to confer on it 'every privilege and immunity which could reasonably be required and which would tend to the completion of the road.' "

This Court in Mobile & Ohio Railroad vs. Tennessee, 153 U. S. 486, 501, determined that the Legislature of Tennessee was actuated by similar motives in granting a charter exemption from taxation to a railroad company, and said, page 502:

> "Legislative contracts, especially, should be read in the light of the public policy entertained, and the purposes sought to be accomplished at the time they were made, rather than at a later period when different ideas and theories may prevail."

It is manifest, therefore, that the charter of the Baltimore and Ohio Railroad Company, with the provision for exemption from taxation, was to bring about the construction of the first railroad company in the United States, an enterprise in which the State of Maryland was interested, not only as a matter of policy for the general benefit of the people of the State, but also as one of the partners in the undertaking, and that the State had pledged its faith and credit to assist in launching this new endeavor.

Thus, the Act of 1826 was a contract of the State of Maryland pledging its full faith and credit, and not a mere bounty given to a railroad company after its incorporation as is the Act of 1931, Chapter 497.

Chapter 497 of the Acts of 1931 and Chapter 123 of the Acts of 1826 have nothing in common. The cases

interpreting the contract exemption of the Baltimore and Ohio Railroad have no applicability to the case at bar in which the Act in question gives a mere privilege to the Railroad Company without any valid consideration after said Railroad Company has been operating for a number of years. Moreover, the exemption to the B. & O. was a part of the original charter of the railroad, while the exemption to the W. B. & A. is neither in the original charter of that railroad nor in any amendment thereto. A mere casual inspection of these cases will clearly demonstrate their inapplicability to the case at bar.

As was well expressed by the Circuit Court of Appeals in Baltimore vs. Williams, 61 Fed. (2d) 374, 381:

> "There is a manifest difference between the State's granting an exemption from taxation to persons who propose to organize a corporation which will presumably be of benefit to the public, as an inducement to capitalists to invest money in the enterprise (see Mayor, etc. v. B. & O. Railroad, 6 Gill (Md.) 288, 48 Am. Dec. 531), and granting an exemption to a corporation already organized and engaged in business. In the one case the State is waiving the right to tax in consideration of securing a public benefit; in the other it is granting an exemption without consideration."

The test of the validity of a contract exemption from taxation granted by the State is the consideration issuing to the State. That the acceptance of the obligations incorporated in the charter of a corporation is sufficient consideration for an exemption from taxation and constitutes a contract between the State and the corporation is well settled. It is also established that an exemption from taxation granted to a corporation subsequent to incorporation, which imposes no additional burdens on the corporation, is a mere voluntary and spontaneous

gratuity or a bare privilege made upon no condition and exacting no return. The attempted exemption contained in Chapter 497 of the Acts of 1931 falls within the latter category. See Point II, Subdivision 5, infra.

The distinction is clearly enunciated in 26 R. C. L. 301, where it is said:

> "To constitute a contract of exemption between the State and one of its citizens, there is the same necessity for a consideration that there would be if it were a contract between individuals. An exemption which is a pure gratuity and not founded upon any consideration, express or implied, is not a contract. * * * The most common form of consideration in cases of this kind is, however, the acceptance of the obligations contained in the charter of incorporation. It is well settled that the acceptance of a charter by a public charitable corporation or by a public service corporation, and the consequent assumption of an obligation to perform public or quasi-public duties, is sufficient consideration to support a contract of exemption from taxation. This principle is commonly applied to railroads and other public service corporations * * *. When a corporation has accepted a charter containing no exemption from taxation and an exemption is granted to it by a subsequent legislative enactment, which imposes no additional burdens on the corporation, there is no consideration for the grant of exemption and it does not constitute a contract."

The distinction between contract exemptions from taxation embodied in the charter of a corporation and exemptions granted subsequent to incorporation is well established by decisions of this Court and the Maryland Court of Appeals. Christs' Church vs. Philadelphia, 65 U. S. 300; Tucker vs. Ferguson, 89 U. S. 527; West Wisconsin R. R. Co. vs. Supervisors, 93 U. S. 595; Seton Hall College vs. South Orange, 242 U. S. 100; Grand

Lodge vs. New Orleans, 166 U. S. 143; Appeal Tax Court of Baltimore City vs. Grand Lodge, 50 Md. 421; and B. C. & A. Ry. Co. vs. Wicomico County, 103 Md. 277. See also Salt Co. vs. East Saginaw, 80 U. S. 373; Troy Union R. R. Co. vs. Mealy, 254 U. S. 47; Wisconsin & Michigan Ry. Co. vs. Powers, 191 U. S. 379; Stanislaus Co. vs. San Joaquin C. & I. Co., 192 U. S. 201; Fertilizing Co. vs. Hyde Park, 97 U. S. 659; Newton vs. Commissioners, 100 U. S. 548, and Pennsylvania R. R. Co. vs. Miller, 132 U. S. 75. See likewise 2 Cooley on Taxation, 1488.

The historical development of this distinction in the Supreme Court of the United States is clearly summarized by Frank J. Goodnow in an article entitled "Nature of Tax Exemptions," 13 Columbia Law Review, 106, wherein he said:

> "The next contribution of the Supreme Court to the law of tax exemptions was made with regard to the character of the consideration necessary as an element in any contract of exemption. This was made in The Piqua Branch of the State Bank of Ohio v. Knoop (16 How. 369) decided in 1853. In this case, it was held on the authority of the Dartmouth College Case that the act incorporating a corporation, acted upon by the corporation, was sufficient consideration upon which to base a contract of exemption from taxation contained therein.
>
> It was only, however, in 1860 that the Supreme Court determined what was the nature of a naked exemption from taxation granted to a corporation already in existence at the time of the grant and not based upon a consideration. In that year it was held that an act of the State legislature providing
>
> > 'that the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the City of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes'

did not constitute a contract of exemption. (Rector &c. of Christ Church v. County of Philadelphia, 24 How. 300, 301, 302). The court says that:

> 'This concession of the legislature was spontaneous, and no service or duty, or other remunerative condition, was imposed on the corporation. It belongs to the class of laws denominated privilegia favorabilia * * * it exists bene placitum, and may be revoked at the pleasure of the sovereign.'

This is the present rule of the Supreme Court. Grand Lodge v. New Orleans (1897) 166 U. S. 143."

The case of State vs. B. & O. R. R. Co., 127 Md. 434, involved Chapter 155 of the Acts of 1878. The Court in that case held that this Act was a contract supported by a large and valuable consideration, that it contemplated a settlement of counterclaims between the State and the Baltimore and Ohio Railroad Company arising out of a number of different contentions, that by agreement these claims were settled and the Railroad Company relinquished part of its existing right of exemption from taxation, and that no grant of any new right by the State to the Railroad Company was involved in this Act, although there was a relinquishment of an existing right by the State, in return for which the State acquired a valuable right not theretofore possessed. The title of Chapter 155 of the Acts of 1878 provided:

> "An Act to adjust and settle finally by an agreement all pending controversies between the B. & O. R. R. Co. and the State of Maryland."

This case unquestionably involved a matter of contract in which a valuable consideration issued in favor of the State. There was no grant of any new right by the State to the Railroad Company. The Court held that the State had a right to make contracts of this char-

acter. Nothing of this character is involved in the case at bar. The facts of the 127 Md. case and the case at bar are so different that the distinction between the two is self-evident.

The B. C. & A. Railway cases are even more remote in their applicability to the case at issue. These cases involved the question of the transfer or descent of an exemption from taxation purporting to have been granted to the Baltimore and Eastern Shore Railroad Company by the Acts of 1886, Chapter 133, to the purchaser of this Railroad Company on foreclosure sale, and through him to the newly organized B. C. and A. Railway Company. The Court held in 89 Md. 89, 93 Md. 113, and 103 Md. 277, that the exemption did not pass to the B. C. & A. Railway Company, and the Supreme Court of the United States concurred with the Maryland Court in Wicomico County vs. Bancroft, 203 U. S. 112.

In B. C. & A. Ry. Co. vs. Ocean City, 89 Md. 89, the Court said, page 96:

> "By the Act of 1886, chapter 133, the powers of the Baltimore and Eastern Shore Railroad were enlarged, and 'its franchises, property, shares of capital stock and bonds' were exempt from all State, county or municipal taxation for the term of thirty years, *accounting from the date of the completion of the road, between the termini mentioned in its charter*, that is, between Eastern Bay in Talbot County and the town of Salisbury in Wicomico County. This road was completed on or about the first of August, 1891."

In the B. C. & A. cases, as well as in the B. & O. cases, supra, no point was raised as to the constitutionality of the original exemption, and the Petitioner contends that the failure of the Court to consider this

question of the constitutionality of the original exemption was in effect an approval of the constitutionality of said original exemption, and is precedent for the constitutionality of Chapter 497. This reasoning disregards the facts of the cases and is *per se* unsound.

In the B. C. & A. Railway Company cases, it is apparent that both sides assumed for the sake of argument that the original exemption statute of the Baltimore and Eastern Shore Railroad Company was constitutional, i. e., for the sake of argument, it was admitted that this exemption statute was valid, but even admitting the validity of said statute, the rights thereunder did not pass to the purchaser on foreclosure sale. The Court, therefore, was not presented, as it is in the case at bar, with the question of the constitutionality of the Act exempting the railroad property, but with an entirely different point of law.

It is submitted that the Court of Appeals of Maryland will not declare an Act of the Legislature unconstitutional unless the question of constitutionality is directly raised and unless the determination of the constitutionality of the Act is necessary for the decision of the case. It is the policy of the Courts of Maryland not to declare an Act of the Legislature void and inoperative if it is possible to decide the question at issue on any other ground. Gregg vs. Public Service Commission, 121 Md. 1, 30; State vs. Norris, 70 Md. 91; Weber vs. Probey 125 Md. 544.

This generally accepted doctrine is well stated in 6 R. C. L. 77, where it is said:

> "One application of the general principle that courts will not pass on the constitutionality of an act of the legislature, if the merits of the case in hand

> may be fairly determined without doing so is that if the case may be decided on either one of two grounds and one of these does not involve the constitutionality of a statute, the court will decide it on that ground."

This Court, in adhering to the rule as above stated, said in Siler vs. Louisville & Nashville R. R. Co., 213 U. S. 175, at page 193:

> "Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons."

See also King vs. Mullins, 171 U. S. 404, 422; Light vs. United States, 220 U. S. 523, 538, Chicago G. W. Ry. vs. Kendall, 266 U. S. 94, 98, Cincinnati vs. Vester, 281 U. S. 439, 449, and 1 Willoughby on the Constitution of the United States, 2nd Edition, page 25.

The fact that an exemption statute was before the Maryland Court of Appeals in the B. C. & A. cases and in the B. & O. cases and was construed in said Court is not conclusive of its constitutionality when such question was never expressly determined, as it is not the province or practice of Courts to seek out constitutional defects. 6 R. C. L. 66 and cases there cited.

That the previous adjudication of a Court upon the meaning of a statute without considering the constitutionality of said statute does not preclude the Court from considering the constitutionality of said statute in a later case, although the question of constitutionality might have been raised and determined in the first instance, is well established in this Court. Boyd vs. Alabama, 94 U. S. 645, 647; Joplin Mercantile Co. vs. U. S., 236 U. S. 531, 543.

In Boyd vs, Alabama, 94 U. S. 645, the Court said, page 647:

"The questions thus presented for our consideration relate to the constitutionality of the act of 1868, and the effect upon the right or privilege there conferred of the repealing act of 1871. The defendant contends that the right or privilege to set up and carry on lotteries in the State, conferred by the act, rests on a contract of the State, a consideration being given for its grant by the prescribed yearly payment into the treasury, and that the repealing act cannot, therefore, impair it. In consequence of a previous adjudication of the Supreme Court of the State, construing the act as creating a contract with the persons therein named, the defendant further contends that the State is estopped from denying its constitutionality.

It is true, that, in a former case against the same defendant, upon an indictment of a similar kind, for a previous offence of setting up and carrying on a lottery, the Supreme Court of the State held that the statute in question constituted a contract, and that the repealing act was for that reason void. But in that case the only subject before the court was the meaning of the statute,—whether its provisions in their terms amounted to a contract which a subsequent enactment could not impair. The constitutionality of the act was not drawn in question; that was not denied.

Courts seldom undertake, in any case, to pass upon the validity of legislation, where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then, they will construe the acts presented for consideration, define their meaning, and enforce their provisions. The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when that question is presented. Previous adjudications upon other points do not

operate as an estoppel against the parties in new cases, nor conclude the court, upon the constitutionality of the acts, because that point might have been raised and determined in the first instance. So when, in the present case, the point was taken for the first time against the constitutionality of the act of 1868, the court was not precluded by the previous decisions from freely considering and determining it. Having considered it, the court came to the conclusion that the act could not be sustained."

This case conclusively demonstrates the legal insufficiency of the Petitioner's contention. The B. & O. cases, the B. C. & A. cases, Havre de Grace vs. Bridge Company, 145 Md. 491, State vs. Northern Central R. R. Co., 90 Md. 447, and similar cases could be dismissed from consideration if there were not even more controlling evidence of their irrelevancy to the case at bar under the decision in Baltimore vs. Starr Church, 106 Md. 291.

It is interesting to note that the exemption involved in the B. C. & A. Railway Company cases was granted to the Baltimore and Eastern Shore Railroad Company effective only when the railroad completed the construction of its line of railroad between specified termini. It was, therefore, an exemption from taxation conditioned upon the initial construction of a railroad.

For these reasons—first, that the parties to the controversies in these cases assumed for the sake of argument the validity of the exemption statute; and secondly, that the Court of Appeals of Maryland will not declare an Act unconstitutional if the point at issue can be determined on any other ground, there can be no analogy between the B. C. & A. cases and the case at bar. These B. C. & A. cases do not create a precedent that will take the case at issue out of the operation of the long line of cases

hereinbefore set forth, clearly demonstrating the unconstitutionality of Chapter 497. The Petitioner bases his contention upon inferences drawn from the failure of the Court to raise the question of constitutionality of an Act of the Legislature when there was no necessity for the Court to decide the same, since the matter in controversy in those cases could be and was decided on an entirely different question of law. The Court found that the exemption in question in the B. C. & A. cases no longer existed. It had ceased to be effective when the original Railroad Company, the Baltimore and Eastern Shore Railroad Company, was forced by financial difficulties to sell its property and ceased to exist as a corporation. Why should the Court concern itself with the validity of a right to exemption from taxation when this right had expired by operation of law?

It is submitted that the Court of Appeals of Maryland has directly expressed the policy of the State of Maryland in reference to exemptions from taxation in a number of cases, particularly the case of Baltimore vs. Starr Church, 106 Md. 281. In so far as the Petitioner's contention in this case is attempted to be supported by any authority, it rests solely upon a line of cases involving entirely different questions and issues, from which it seeks, by inference and implication only, to establish by naked construction, a policy of tax exemption with reference to railroads, which if it exists, is completely at variance with the fundamental principles explicitly stated by the Court of Appeals in the Starr Church case, and the other cases above referred to. Surely, an Act of the Legislature granting exemption from taxation in derogation of the sovereign power of the State of Maryland and contrary to the express limitations imposed upon the Legislature by the Constitution of Maryland, cannot be sustained simply by inference or implication. It has

been shown herein that the rule of strict construction of the power of the Legislature must be applied in determining the constitutionality of Chapter 497. This alone would be a bar to relying upon cases, which, accepting the Petitioner's argument in full, only support his contention by inference or implication.

Therefore, since the B. & O. cases and the B. C. & A. cases involve an entirely different question of law, they cannot be held authority by inference or implication for the conferring of power upon the Legislature to grant exemptions from taxation which was expressly denied thereto by Baltimore vs. Starr Church, supra, which dealt directly with the question of exemption from taxation.

Furthermore, this contention of the Petitioner has already been considered and repudiated by the Maryland Court of Appeals. The same argument was presented to the Maryland Court by Starr Church in Baltimore vs. Starr Church, 106 Md. 281, and the refusal of the Court to accept the same in that case finally and completely settles its inefficacy an inapplicability in Maryland.

State vs. B. & O. R. R. Co., 48 Md. 49, and B. C. & A. Ry. Co. vs. Ocean City, 89 Md. 89, were relied upon by Starr Church in its brief and argument in the 106 Md. case, to sustain the power of the Legislature to grant the exemption to the Starr Church contained in the Act of 1904, for the same reasons that they are relied upon by the Petitioner in the case at bar. This contention of the Starr Church relying upon the B. & O. and the B. C. & A. cases, did not prevail in the 106 Md. case. This is conclusive of the issue at bar, and the contention of the Petitioner that the Legislature had the power to grant the exemption in Chapter 497 and that the Maryland Courts by inference or implication in the cases named

have approved the constitutionality of similar Acts of exemption, must be dismissed. See Records and Briefs of the Court of Appeals of Maryland, Volume 106, Part 3, page 281.

In view of this attitude of the Maryland Court, the Circuit Court of Appeals, applying the doctrine of stare decisis, said (Baltimore vs. Williams, 61 Fed. (2d) 374, 381):

> *"At all events, the cases of State v. B. & O. R. R. Co. and B. C. & A. R. Co. v. Ocean City were urged upon the Court of Appeals of Maryland as justifying the exemption granted in the Starr Church case and were held not to justify it; and we must follow the decisions of Maryland as to the meaning of the provisions of the Constitution of that State and as to the application of prior decisions to questions arising thereunder."*

The cases of State vs. No. Central R. R. Co., 90 Md. 447, and Havre de Grace vs. Bridge Company, 145 Md. 491, cited by the Petitioner in addition to the B. & O. and B. C. & A. cases, are distinguishable for the reasons stated above.

In State vs. No. Central R. R. Co., supra, the question of the constitutionality of the Acts of 1880, Chapter 16, was not raised. The issue presented, as stated by the Court on pages 465-6, was whether the Act of 1880 was subject to repeal by subsequent legislation, and if so, was it in fact repealed by the Act of 1890, Chapter 559, which imposed a tax of one per cent. per annum on the gross receipts of all railroads. The Court held that the Act of 1880 was subject to repeal and was in fact repealed by the Act of 1890. Moreover, the partial or limited exemption from taxation granted by the Act of 1880, i. e., that it should be subject to a tax of one-half of

one per cent. annually on its gross receipts, and no more, resulted from an agreement between the State and the Railroad Company to settle all pending tax controversies. The title of the Act provided:

> "An Act to adjust and settle finally, by agreement, all pending controversies between the State of Maryland and the Northern Central Railroad Company."

Havre de Grace vs. Bridge Company, 145 Md. 491, does not involve the exemption of a railroad, but relates to the exemption of a vehicular and pedestrian bridge, the bridge being an integral part of the public highway system of the State, in fact, being the connecting link between the eastern and western shores of Maryland. Moreover, the exemption was contained in an amendment to the charter of the Bridge Company. Furthermore, the question of the constitutionality of the exemption was not passed upon by the Court as it was not necessary to do so in determining the issue raised by the facts of the case.

The Petitioner in his brief for the Circuit Court of Appeals, page 9, said:

> "The only conclusion deducible from the decisions of the Court of Appeals of Maryland is that that Court has never regarded the question of the power to grant an exemption from taxation as being open to question."

The Court of Appeals of Maryland in the cases cited by the Petitioner referred to above, "never regarded the question of the power to grant an exemption from taxation as being open to question," because in those cases the question of the constitutionality of the exemptions was not raised, and a decision on that issue was not necessary. If the Maryland Court had "never regarded the

question of the power to grant an exemption as being open to question," why did it declare the exemptions unconstitutional and void in such vigorous language in Baltimore vs. Starr Church, 106 Md. 281, Baltimore vs. Cahill, 106 Md. 596, Wells vs. Hyattsville, 77 Md. 125, Maxwell vs. State, 40 Md. 273, Prince George's County vs. Laurel, 70 Md. 443, Curtis vs. Mactier, 115 Md. 386, and Schley vs. Lee, 106 Md. 390?

And, why did the Maryland Court in Baltimore vs. German American Fire Ins. Co., 132 Md. 380, find it necessary, in upholding the validity of Chapter 197 of the Acts of 1914, the only exemption statute approved by the Court of Appeals of Maryland since the Starr Church case, to differentiate that Act from the one decided unconstitutional in the Starr Church case, in the following language, page 388:

> "In that (Baltimore vs. Starr Church) case, the exemption granted was to a single corporation and not to a class as in this case."

Chapter 197 of the Acts of 1914, held valid in 132 Md. 380, provided for exemption from taxation of domestic fire insurance companies upon mortgages held by them. This Act was a public general law and granted exemption to a class, domestic fire insurance companies. It provided expressly for the repeal and reenactment of a particular and specified provision of the Maryland Code, the title of the Act being:

> "An Act to repeal and reenact Section 159 of Article 81 of the Code of Public General Laws of Maryland, 1904, title 'Revenue and Taxes,' Sub-title 'State Tax Commissioner'."

Therefore, the only case in Maryland since the decision in the Starr Church Case which considers the question

of the constitutionality of a tax exemption statute, dealt with a statute providing for the exemption of a class of corporations, and which was enacted as a public general law, referring in its title to the specific Article and Section of the Code of Public General Laws of Maryland which was repealed and reenacted. It possessed those requisites essential to the validity of a tax exemption statute discussed at length above, and in respect to which requisites Chapter 497 is conspicuous for their absence.

5. CHAPTER 497 OF THE ACTS OF 1931 IS NOT A CONTRACT BETWEEN THE STATE AND THE RAILROAD COMPANY.

(1) *Chapter 497 not a contract as a matter of fact.*

The Petitioner maintains that Chapter 497 resulted in a contract, and therefore, was removed from the inhibitions imposed by the Maryland Constitution. The contention is that the General Assembly of Maryland offered to the Railroad, whose continued operation, it is alleged, was threatened, an exemption from taxation as to its railroad property during such part of two years as the property might be used for railroad purposes and that the Railroad accepted this offer by the continuation of its operation, thus creating a binding agreement and contract.

This theory of the creation of a contract is based entirely upon assumption. It is assumed that the Legislature intended to make a binding agreement granting an irrepealable contract of exemption for two years. It is assumed that the Act itself amounted to a binding offer to the Railroad Company. It is assumed that the Railroad Company of its own volition could discontinue its operation, and it is assumed that the consideration on the part of the Railroad Company was its continuance of operation. It is assumed that the Railroad accepted

the offer allegedly made by the Legislature by its continuance of operation, and it is assumed that this resulted in a contract.

As a matter of fact, there is nothing in the language of the Act to demonstrate the intent of the Legislature to make a contract. It is submitted that a contract must be shown to exist, and that it cannot be presumed, and that every reasonable doubt should be resolved against it. West Wisconsin R. R. Co. vs. Supervisors, 93 U. S. 595. Chapter 497 is a tax exemption statute and must be strictly construed. Strictly construing the statute, there is nothing in the words thereof that will permit directly or by implication the establishment of a contract.

Moreover, there is no consideration on the part of the Railroad Company. It is argued that the continuance of operation by the Railroad is the consideration. However, this is too indefinite to form a consideration for any contract, and particularly a contract exemption from taxation, as the Act does not require the Railroad to continue operation for any designated period. In fact it does not require the company to continue operation at all. The strict construction rule applicable to contract exemptions from taxation will not permit the establishment of an exemption contract by implication as suggested by the District Court. The contract and the terms thereof must be definite, explicit and plainly expressed in the words of the Act. West Wisconsin R. R. Co. vs. Supervisors, supra.

And furthermore, if in disregard of the proper rule of construction, it be contended that the continuance of operation by the Railroad is consideration for the exemption, such contention is groundless because the Railroad could not discontinue operation of its own volition. Thus

the continuance of operation is merely the performance of an obligation imposed upon the Railroad by the Public Service Commission Law of Maryland. If, therefore, the Railroad Company is compelled by law to continue operation unless granted the right of discontinuance and abandonment after investigation and public hearing by the Public Service Commission, then the continued performance of a legal obligation is not a consideration for a contract.

The Public Service Commission Law of Maryland (Article 23, Section 380 of the Annotated Code of Maryland), provides:

> "No common carrier, railroad corporation or street railroad corporation, shall abandon or discontinue in whole or in part, the exercise of any franchise or right, under any provision of the railroad law, or any other law, in so far as it is then actually being exercised for the public service, without the permission and approval of the Commission first obtained, after due hearing, and the determination by the Commission that the present or future public convenience or necessity permit of such abandonment or discontinuance of the exercise of such franchise or right."

See also United States Code, Title 49, Section 1, Paragraphs (18) and (19).

Even though it is true that an insolvent railroad which has failed to earn operating expenses cannot be forced to continue operations at the expense of the creditors until the corpus is exhausted, nevertheless it is submitted that it is necessary in order to abandon a railroad to follow the prescribed forms of law and obtain the approval of the Maryland Public Service Commission. Moreover, no attempt has been made by the Railroad Company to

abandon its operations, and there is no indication or evidence of such an intent or purpose to abandon. The mere fact of insolvency does not justify the conclusion that the Railroad or the Receiver thereof planned to discontinue its operations and abandon its lines of railway. There is nothing in the record to sustain an intended abandonment of the railroad. Certainly, the statute itself gives no indication in its language that the exemption was given to prevent abandonment. Such an intent, under the rule of construction applicable thereto, cannot be attributed to the Legislature. West Wisconsin R. R. Co. vs. Supervisors, 93 U. S. 595; Grand Lodge vs. New Orleans, 166 U. S. 143; B. C. & A. Ry. Co. vs. Wicomico County, 103 Md. 277, and Schley vs. Lee, 106 Md. 390.

In Schley vs. Lee, 106 Md. 390, it is said, page 400:

> "We are now dealing with a subject (exemption from taxation) in reference to which it has been held by a long line of decisions that the legislative intent in order to be effective must be expressed in the clearest and most unambiguous language."

In Yazoo & Mississippi Valley Ry. Co. vs. Adams, 180 U. S. 1, this Court said, page 22:

> "Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislature. Public policy in all the states has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational and municipal purposes; but this list ought not to be extended except for very substantial reasons; and while, as we have held in many cases, legislatures may in the interest of the public contract for the exemption of other property, such contract should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power. *In-*

*deed, it is not too much to say that courts are astute to seize upon evidence tending to show * * * that such exemptions were not originally intended. * * *"*

It is a matter of history that many railroads in the United States have been through receivership without affecting the operations of the insolvent railroads. Furthermore, at the time of the passage of the Act under consideration in this case, the Railroad was operating as such and its property is still being used for railroad purposes today.

It is said that the Railroad has been kept in operation, but the Respondent fails to discover from anything in the record that it would not have done so except in reliance upon the tax exemption extended to it by the Legislature. Seton Hall College vs. South Orange, 242 U. S. 100, 106.

All the Legislature attempted by Chapter 497 was to grant a mere gratuity and bounty to the Railroad Company. The Legislature does not by Chapter 497 profess to amend the charter of the Railroad Company. The Legislature simply gives a special privilege to the Railroad. It is purely a spontaneous grant made upon no condition and exacting no return. The State asked for no promise from the Company and the Company gave none. Neither party was, nor was intended to be, in anywise bound to the other. There was no assurance or intimation that the State would not withdraw the gratuity within the two year period. The State had an unqualified right to do so, because if a different intent had existed, it would doubtless have been clearly manifested by the language employed. West Wisconsin R. R. Co. vs. Supervisors, 93 U. S. 595; Grand Lodge vs. New Orleans, 166 U. S. 143; B. C. & A. Ry. Co. vs. Wicomico County, 103 Md. 277.

Likewise, the continuation of railroad operation was beneficial to the Company as well as to the public. A railroad in active operation is far more valuable to its bondholders and stockholders and to prospective purchasers than an abandoned right of way, idle cars and vacant terminals. It was to the Railroad's interest to continue operation. By using its property for railroad purposes as it had been doing, it not only preserved the said property and maintained its value, but under Chapter 497 placed itself in a position to enjoy the gratuity provided for by this Act. Surely such a situation does not give rise to a contract. Prima facie every presumption is against the establishment of a contract. It is only where the terms of the exemption Act "are too explicit to admit fairly of any other construction that the proposition (of the existence of a contract) can be supported." West Wisconsin R. R. Co. vs. Board of Supervisors, supra; Grand Lodge vs. New Orleans, supra; B. C. & A. Ry. Co. vs. Wicomico County, supra.

(2) *Chapter 497 not a contract as a matter of law.*

The Maryland Court of Appeals and the Supreme Court of the United States are in complete accord in holding that an Act of the Legislature, such as Chapter 497, does not create a contract of exemption, but, if valid, only grants a mere gratuity. That is, if Chapter 497 were a valid exercise of power by the Legislature, it would at the most be simply a voluntary grant of exemption from taxation without consideration. It is well settled in Maryland that an exemption from taxation granted to a railroad company after its incorporation, if valid, is a mere privilege, and not a contract. Appeal Tax Court of Baltimore City vs. Grand Lodge, 50 Md. 421; B. C. & A. Ry. Co. vs. Wicomico County, 103 Md. 277.

In Appeal Tax Court of Baltimore City vs. Grand Lodge, 50 Md. 421, the Court said, pages 427-428-429:

> "The Grand Lodge of Ancient Free and Accepted Masons of Maryland, was incorporated in 1821, as a benevolent and charitable institution * * *.
>
> By the Act of 1867, ch. 23, the ground and building belonging to the appellee in Baltimore City, known as 'The Masonic Temple,' and the stock issued by the corporation for the erection of the building, were both exempted from taxation *so long as the building should be used for the purposes for which the appellee was chartered.* It is now contended, that the exemption thus granted, is in the nature of a contract between the State and the corporators, and therefore irrepealable. * * *
>
> Now, in this case, *the exemption claimed by the appellee formed no part of its original charter, but was granted by a subsequent Act of the Legislature, which merely declares that certain property belonging to the corporation shall be exempt from taxation. There is no consideration expressed, nor is there anything in the Act from which one can be inferred,* and the case comes, therefore, directly within the decision in Rector, &c. of Christ Church vs. County of Philadelphia, 24 Howard, 300. There, the property belonging to Christ Church Hospital was, by an Act of the Legislature, exempted from taxation, *so long as the same should belong to said Hospital;* and it was contended, as in this case, that the exemption thus granted was a contract, and therefore beyond the power of a subsequent Legislature to repeal. The Supreme Court, however, held it to be a mere privilege, revocable at the pleasure of the power that granted it.
>
> In Home of the Friendless vs. Rouse, 8 Wallace, 430, the exemption formed a part of the charter of the corporation, and a majority of the Court were of opinion that the benefit resulting to the public from a charity of that kind, was a sufficient consideration to support the contract.

> But this case cannot be considered as overruling, or in any manner contravening the decision in 24 Howard. On the contrary, *in* the subsequent case of *Tucker vs. Ferguson*, 22 Wallace, 528, the doctrine laid down in 24 Howard is reviewed and affirmed, and *all the judges concurred in holding, that an exemption from taxation granted to a railroad company after its incorporation, was a mere privilege*, revocable at pleasure.
>
> We are of opinion, therefore, that the exemption granted to the appellee by the Act of 1867, was a mere privilege. * * * "

It is most significant to note the similarity of the language used in the Act of 1867 construed in the 50 Md. case, supra, exempting the Grand Lodge property "so long as said Temple shall be held and used by the aforesaid Grand Lodge for its own use and purposes, as set forth in its act of incorporation," and the language used by the Pennsylvania Legislature in Act 103 of the Laws of 1833 construed in 24 Howard, supra, exempting property of Christs' Church Hospital "so long as they (real property including ground rents) shall continue to belong to the said hospital," and the language of Chapter 497 exempting the property of the Railroad Company "used for railroad purposes * * * for the years during which the property is so used." It is manifest that the language of the exemption statutes here referred to are practically identical. In both the United States Supreme Court case and the Maryland case it was held that such language did not establish a contract. It would seem that these decisions are completely decisive and controlling in the case at bar. In face of such authorities, it appears difficult to accept the contention of the Petitioner that Chapter 497 resulted in a contract between the State and the Railroad.

In B. C. & A. Ry. Co. vs. Wicomico County, 103 Md. 277, the question involved was whether an exemption from taxation granted by the Act of 1886, Chapter 133, to the Baltimore and Eastern Shore Railroad Company passed through the purchaser of said railroad company at foreclosure to the newly organized B. C. & A. Railway Company. As we have seen above, the constitutionality of this exemption was not passed upon by the Court as it was not necessary to do so in determining the issue presented by the facts of the case since the exemption was personal to the Baltimore and Eastern Shore Railroad Company and, as the result of the foreclosure sale of the property of this company, had ceased to exist, and therefore, could not pass to the B. C. & A. Railway Company. The Court said, page 288:

> "* * * the exemption from taxation * * * did not rest upon a contract * * * but was the creature of a mere voluntary grant by the Legislature. It was not one of the terms of the charter of that company. It was granted by the Act of 1886, ch. 133, which does not either in its title or its contents profess to amend the charter of the company. It is purely a spontaneous grant made upon no condition and exacting no return. * * * (p. 291). It is true the exemption was not by the terms of the Act to begin until the completion of the road but the company was not required to build the road and when it did so it improved by so much the value of its own property."

The decisions relied upon in reaching the conclusion that the exemption was not a contract ~~as~~ are set forth by the Court as follows, pages 289-290-291:

> "In Christs' Church v. Philadelphia, 65 U. S. 300, the Legislature of Pennsylvania in 1833 passed an Act reciting that Christs' Church Hospital had for many years afforded an asylum to poor persons who

would probably else have become a public charge, and enacting that the real property and ground rents belonging and payable to the hospital should, so long as they continued to be owned by it, be and remain free from taxes. In 1851 the same Legislature enacted a general law providing that all real and personal property belonging to any association or corporation which was then by law exempt from taxation, other than that which was in the actual use of the corporation or association or from which it derived an income, should be subject to taxation in the same manner as other property, and declared as repealed pro tanto all previous inconsistent legislation. The hospital corporation resisted the payment of taxes, levied on certain of its lands under this Act of 1851, upon the ground that the Act of 1833 exempting the land from taxation was in effect a contract which was impaired by the taxation of the land under the Act of 1851 in violation of the Federal Constitution. The Supreme Court of the United States when the case came to it on appeal rejected the contention of the hospital and held that, as the Act of 1833 was a spontaneous concession of the Legislature and no service or duty or other remunerative condition was imposed upon the corporation, the exemption granted by it existed bene placitum and might be revoked at the pleasure of the sovereign. The taxation under the Act of 1851 was held to have been valid.

In Tucker v. Ferguson, 89 U. S. 575, it was held that a provision in an Act of the Michigan Legislature of 1871 exempting certain lands of the Flint & Pere Marquette Railroad Co. from taxation for a certain number of years was not a contract because there was no consideration for it and the railroad company was required to do nothing and did nothing in return for it. It would have been a nude pact as between individuals and 'it had no higher character because one of the parties to it was a State and the other a corporation and it was put in the form of a statute.' 'It was the promise of a gratuity spontaneously made which might be kept, changed or re-

called at pleasure.' The Court in that case affirmed the decree of the Circuit Court for the Western District of Michigan which refused to enjoin the State from taxing the railroad company before the expiration of the period of exemption fixed by the Act of 1871. It does not appear from the report of that case that there had been any formal repeal of the Act granting the exemption from taxation.

In the West Wisconsin R. R. Co. v. Supervisors, 93 U. S. 595; Tucker v. Ferguson, was cited and relied on in construing an Act of the Legislature of Wisconsin of 1870 exempting from taxation lands of a railroad company for a certain period 'upon the express condition that if said railroad company shall not have built their said road within two years from the passage of this Act then and in that case this Act shall be null and void.' It was held in that case that the Act in question did not constitute a contract within the meaning of the Constitution of the United States and that the exemptions granted by it 'were gratuities offered by the State without any element of contract.' *The Court there say that the taxing power 'may be restrained by contract in special cases for the public good when such contracts are not forbidden. But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it.' It was also held that the condition in the Act in reference to the early completion of the road did not alter the case, the Court saying, 'The early completion of the road was beneficial to the company as well as to the public. * * * If the company came within the condition specified in the Act of 1870 it would be in a position to take the gratuity offered by that Act. If this were so the State might continue or withdraw that gratuity when it took effect as it might deem best for the public welfare.'* The road was completed within the two years but the Legislature before the expiration of the exemption passed a general Act declaring liable to taxation the lands of any railroad, lying in the county traversed by the West

Wisconsin Railroad, 'not used for road-bed or depot purposes' and that Act was held valid although its effect was to withdraw pro tanto, the exemption granted by the Act of 1870. That case was affirmed in Grand Lodge v. New Orleans, 166 U. S. 149, and it has frequently been cited and relied on in the State Courts."

In addition to Christs' Church vs. Philadelphia, 65 U. S. 300; Tucker vs. Ferguson, 89 U. S. 575, and West Wisconsin R. R. Co. vs. Supervisors, 93 U. S. 595, discussed at length in the foregoing Maryland decision, the case of Seton Hall College vs. Village of South Orange, 242 U. S. 100, is particularly pertinent, the Court saying, page 106:

"To all claims of contract exemption from taxation must be applied the well settled rule that, as the power to tax is an exercise of the sovereign authority of the State, essential to its existence, the fact of its surrender in favor of a corporation or an individual must be shown in language which cannot be otherwise reasonably construed, and all doubts which arise as to the intent to make such contract are to be resolved in favor of the State. Hoge v. Railroad Co., 99 U. S. 348, 354; New Orleans City and Lake Railroad Co. v. New Orleans, 143 U. S. 192, 195; Wilmington & Weldon Railroad Co. v. Alsbrook, 146 U. S. 279, 294; Phoenix Insurance Co. v. Tennessee, 161 U. S. 174, 179; Yazoo &c. Railway Co. v. Adams, 180 U. S. 1, 22.

Applying these principles, we are unable to conclude that the state court was wrong in finding no binding contract here. As we have said, the college was incorporated under no promise of such exemption, and could not have relied upon it in undertaking the work for which it was recognized. After the privilege of the act in favor of the Drew Seminary was extended to it, it made no new promises and assumed no new burdens. *It is true it has been kept in operation, and has doubtless continued and expanded its usefulness, but we fail to discover from*

anything in this record that it would not have done so except in reliance upon the tax exemption extended to it by the legislature."

See also Grand Lodge vs. New Orleans, 166 U. S. 143; Troy Union R. R. Co. vs. Mealy, 254 U. S. 47; Wisconsin & Michigan Ry. Co. vs. Powers, 191 U. S. 379; Stanislaus Co. vs. San Joaquin C. & I. Co., 192 U. S. 201; Fertilizing Co. vs. Hyde Park, 97 U. S. 659; Newton vs. Commissioners, 100 U. S. 548; Pennsylvania R. R. Co. vs. Miller, 132 U. S. 75, and 26 R. C. L. 301.

In view of the foregoing decisions, it is needless to dwell further on the Petitioner's contention that Chapter 497 constitutes a contract.

(3) *A contract cannot be predicated on an unconstitutional statute.*

The argument that Chapter 497 was an offer of relief from taxation to the Railroad if the condition of the Act were accepted by the continued operation of the Railroad, and that the Railroad, having accepted this condition and continued operations, it acquired vested rights under a contract, is further answered by the fact that a contract cannot be predicated upon an unconstitutional statute. There was a fundamental lack of power in the Legislature to make such a contract by reason of the provisions of the Maryland Constitution, which are supreme and controlling. The Legislature could not, therefore, bind the State and deprive Baltimore City of substantial rights and revenue to which it is entitled under the general laws of Maryland by a statute which the Legislature had no power to enact, and this Court and the Court of Appeals of Maryland so hold. Louisville & Nashville R. R. Co. vs. Palmes, 109 U. S. 244, 254; Northern Central Ry. Co. vs. Maryland, 187 U. S. 258; Boyd vs. Alabama,

94 U. S. 645; Railroad Co. vs. Gaines, 97 U. S. 697; Yazoo & Mississippi Valley Ry. Co. vs. Adams, 180 U. S. 1; State vs. No. Central Ry. Co. 90 Md. 447, 471. See also 26 R. C. L. 305, and Baltimore vs. Williams, 61 Fed. (2d) 374, 381.

III.

CHAPTER 497 VIOLATES ARTICLE 3, SECTION 33, OF THE CONSTITUTION OF MARYLAND.

Article 3, Section 33 provides:

> "*The General Assembly shall not pass local or special laws* in any of the following enumerated cases, viz: For extending the time for the collection of taxes, granting divorces, changing the name of any person, providing for the sale of real estate belonging to minors or other persons laboring under legal disabilities, by executors, administrators, guardians or trustees, giving effect to informal or invalid deeds or wills, refunding money paid into the State Treasury, or *releasing persons from their debts or obligations to the State, unless recommended by the Governor or officers of the Treasury Department.* And *the General Assembly shall pass no special law for any case for which provision has been made by an existing general law.* The General Assembly, at its first session after the adoption of this Constitution, shall pass general laws providing for the cases enumerated in this section which are not already adequately provided for, and for other cases where a General Law can be made applicable."

1. JUDICIAL INTERPRETATION OF ARTICLE 3, SECTION 33.

In Baltimore vs. Starr Church, supra, the Court held that the Act exempting the wharf property of Starr Church was void, as a special law violating Article 3, Section 33, because it related to the exemption of property of a religious corporation which was already provided for by an existing general law declaring in what

cases the property of religious corporations should be exempt and specifying in detail just what kind of such property should enjoy exemption. The Court therein, at pages 288-289, expressed distinctly the purpose of Article 3, Section 33, in the following language:

> "Again we think this act is invalid because in conflict with Art. 3, Sec. 33 of the Constitution of Maryland, which provides that 'the General Assembly shall pass no special law for any case for which provision has been made by an existing general law.'
> • • •
> *The special laws contemplated by the Constitution, are those that provide for individual cases.*
>
> *The object of the provision of the Constitution relied on, was to prevent the abuses that occurred in the great multiplicity of Legislation for particular and individual cases.*"

In Prince George's County vs. Baltimore & Ohio R. R. Co., 113 Md. 179, the Court held that Chapter 398 of the Acts of 1908, directing that a certain railroad company should erect and maintain safety gates with flagmen at two designated crossings of its tracks in a certain county under a daily penalty for failure to comply with the Act, when the public general laws (Article 23, Section 283 of the Code) contained provisions prescribing the conditions under which railroad companies throughout the State may be required by County Commissioners to protect the highways crossing the railroad track, at grade, by flagmen, or safety gates, or electric bells, etc. was unconstitutional and void because it was a special law making particular provisions for two railway crossings of the same kind as provided for in the general laws then in force the Court saying, pages 183-184:

> "A special law is one that relates to particular persons or things of a class, as distinguished from a

general law which applies to all persons or things of a class. * * * In the case of Schmalz v. Wooley, 56 N. J. Eq. 649, 39 Atl. 539, the Court said that where a statute 'does not relate to persons or things of a class, but to particular persons or things of a class, it is a special, as contradistinguished from a general law.' * * *

The obvious meaning of this provision of the Constitution is, that where there is a general law providing for a certain class of cases, the Legislature shall not pass a special law for any particular case of that class."

In Baltimore City vs. Allegany County, 99 Md. 1, it was held that Chapter 579 of the Acts of 1900 was void because in conflict with Section 33 of Article 3, "since provision has been made by an existing general law for the taxation of shares of stock in the hands of the owners and to the owners, at their places of residence, while by this Act, all shares of stock in any corporation of Allegany County, are assessed and taxed in Allegany County to these corporations, and the shareholders are exempted from taxation thereon." The Court, in explaining the effect of this Act, said, page 12:

"It operates in every county in the State in which there is resident any stockholder of an Allegany County corporation, and withdraws from every such county, under a special provision, relating to one class of corporations only, the tax upon shares of stock held by residents of such county, which under the existing general provision would go into the treasury of every such county."

The effect of Chapter 497 is identical to that of the Act declared unconstitutional in this case, since Chapter 497 withdraws from Baltimore City, by means of a special Act, relating to one corporation only, the tax on the real

and personal property of this corporation, which under the general law would go into the treasury of Baltimore City.

In Crisfield vs. C. & P. Telephone Co., 131 Md. 444, it was held that where by the charter of a town it was attempted to grant a municipality power to regulate the charges of a public service corporation, the power was invalid because full and general powers to regulate such corporations for the whole State had already been given to the Public Service Commission, and the attempt to bestow such power on the town or city was in violation of Section 33 of Article 3 of the Constitution, which prohibited the passage of such a special law for any case for which provision had already been made by an existing general law.

In Westminster vs. Consolidated Public Utilities Co., 132 Md. 374, the Court held that Chapter 341 of the Acts of 1910, providing for regulation by the Mayor and City Council of Westminster of the rates of the Water Company that supplied that town with water, was a special law dealing with a subject for which prov' ion was already made by the Public Service Commission Law, and was therefore void because in conflict with Section 33 of Article 3 of the Constitution.

Although it is believed that Baltimore vs. Starr Church, supra, and Baltimore vs. Allegany County, supra, are decisive of the case at bar and entail the conclusion that Chapter 497 is a special law repugnant to Article 3, Section 33, the unconstitutionality of Chapter 497 is removed from all question of doubt by the recent case of Littleton vs. Hagerstown, 150 Md. 163, wherein the Court held void an Act of the Legislature attempting to exempt the town

of Hagerstown from the operation of the Public Service Commission Law, the Court saying, page 175:

> "The most important (question) is that of the constitutionality of chapter 48 of the Acts of 1924. The validity of that act is challenged as violating section 33 of article 3 of the Constitution. * * *
>
> That each of the exemptions made by said act is obnoxious to said constitutional inhibition is apparent, unless it operates upon all within a class, the members of which are all so situated as to require or at least justify legislation different from that applicable to others, and the basis of classification bears a reasonable relation to the subject-matter of the act. * * *
>
> It is difficult to deal with the classifications separately, because it seems obvious that the single purpose in formulating each of them was to exempt Hagerstown from the operation of the Public Service Commission Law."

The Act construed in this case attempted to make certain classifications, but the Court held it to be void because its object was to exempt one town from the operation of a general law. It seems apparent and logical that if that Act was unconstitutional as violating Article 3, Section 33, certainly Chapter 497, which makes no attempt to classify, its sole purpose being to relieve one corporation from the operation of the general law, must likewise be repugnant to the same provision of the Constitution.

Littleton vs. Hagerstown, supra, is of paramount significance because Hagerstown relied upon Baltimore vs. United Railways Company, 126 Md. 39, as does the Petitioner in the case at bar, in an effort to designate the Act there in question as an Act for special purposes rather than a special Act prohibited by the Constitution.

It is submitted that, since, in spite of the close analogy of the facts in Baltimore vs. United Railways Company, supra, and Littleton vs. Hagerstown, supra, the Court held in the latter case that the former decision was not controlling, the case of Baltimore vs. United Railways Company, supra, surely can have no applicability to the case at bar wherein the facts are of such a divergent character from those upon which the decision in Baltimore vs. United Railways Company rests.

2. PUBLIC GENERAL LAWS OF MARYLAND RE TAXATION AND EXEMPTION OF RAILROAD PROPERTY.

Article 81, Section 6, Paragraphs (1) and (2), of the Annotated Code of Maryland, 1929 Supplement,* provide that all real and tangible personal properties in the State, by whomsoever owned, shall be subject to assessment to the owner and taxation for ordinary taxes in the State and in the county and/or city in which the same are situated.

Section 7, Paragraph (16) of Article 81,* provides for exemption from State, county and city taxation of the shares of stock in domestic railroad companies, which are subject to taxation upon their gross receipts within the State, and from *State taxes only*, the real and personal property of such railroad companies.

And Section 7, Paragraph (21), of Article 81,* provides for the exemption from State, county and city taxation, subject to certain conditions therein contained, of the shares of preferred stock issued after May 31, 1927, by any domestic electric railroad or street passenger railway corporation which derives not less than sixty-five per cent. of its gross receipts from passenger revenue.

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* See Appendix A.

See also B. C. & A. Ry. Co. vs. Wicomico County, 103 Md. 277, hereinbefore referred to, relating to the policy of the State of Maryland, expressly declared by legislative enactment, of assessing and taxing the real and personal property of railroad companies for county and municipal purposes in the same manner in which the property of individuals is assessed and taxed.

3. CHAPTER 497, AS TESTED BY JUDICIAL INTERPRETATION OF ARTICLE 3, SECTION 33, IS NULL AND VOID AS A SPECIAL LAW.

By an existing general law (Article 81, Section 6 (1) and (2)), the real and tangible personal property of the Washington, Baltimore & Annapolis Electric Railroad Company situated in Baltimore City is made expressly subject to assessment and taxation for ordinary taxes in Baltimore City. Moreover, by a general law (Article 81, Section 7 (16) and (21)), it is expressly declared under what circumstances and in what cases the property of railroad companies shall be exempt and specifying in detail just what kind of such property shall enjoy exemption. The real and tangible personal property of said Railroad Company does not fall within the category of exemptions provided for by the general law.

Nevertheless, the Legislature by Chapter 497 has passed a special law relieving the Railroad Company of all State and City taxes, and thus exempting the real and tangible personal property of the Railroad Company situated in Baltimore City from taxation for municipal purposes, although such property is subject to taxation in Baltimore City by the existing general law, and moreover, providing exemption for the property of the Railroad Company when the cases in which the property of railroad companies shall have exemption are already prescribed by a general law.

Chapter 497 is a special law because it relates to an individual and particular railroad company, one of the railroad companies operating in the State of Maryland. This Act provides, therefore, for a separate and individual case of exemption for one railroad company when there is a general law which applies to all railroad companies operating in the State of Maryland.

It seems manifest, therefore, that Chapter 497 is the type of special law providing for a particular and individual case, that the constitutional limitation upon the power of the Legislature (Article 3, Section 33) was designed to prohibit. It is the object of this limitation to prevent the abuse of legislative power by discrimination in particular and individual cases such as is provided for by Chapter 497.

Furthermore, Chapter 497 releases the railroad corporation from its debts and obligations to the State of Maryland. This is done despite the undisputed Maryland principal that every individual (or corporation) in this State should contribute his proportion of public taxes for the support of the Government according to his actual worth in real or personal property. The Railroad Company exempted from taxation by Chapter 497 owed an obligation to the State of Maryland to pay its proper proportion of public taxes. The Legislature relieved the Railroad Company by Chapter 497 of this obligation on its own initiative, which was in direct contravention of the express prohibition of Article 3, Section 33, that "the General Assembly shall not pass local or special laws releasing persons from their debts or obligations to the State, unless recommended by the Governor or officers of the Treasury Department."

There is nothing in the record showing that Chapter 497 was either introduced or passed on the recommenda-

tion of the Governor or officers of the Treasury Department, and it is submitted as an incontrovertible fact that neither the Governor nor any officer of the Treasury Department recommended the passage of Chapter 497 to the Legislature.

Therefore, Chapter 497 is not only violative of the general provision of Article 3, Section 33, that the General Assembly shall pass no special law for any case for which provision has been made by an existing general law, but is also in direct conflict with the specific and particular prohibition against the passage of a special law releasing persons from their debts or obligations to the State. In respect to the debts and obligations of the Railroad Company, the Act creates a preference for the bondholders and general creditors at the expense of the State of Maryland, the City of Baltimore and the taxpayers of both. A more flagrant violation of both the intent and the express language of Article 3, Section 33 of the Maryland Constitution is inconceivable.

The Circuit Court of Appeals, 61 Fed. (2d) 374, following the line of Maryland cases cited herein, said, page 381:

> "Finally, we think that the statute violates Article 3, Section 33 of the Maryland Constitution. * * *
>
> The statute in question is not a law for a special purpose but a special law. It applies not to the public at large or to a class but to a single taxpayer. See the Starr Church Case and 25 R. C. L. 65. It relieves a single corporation from obligations due the state, and does this without recommendation of the Governor or officers of the Treasury Department. Moreover, it deals with a matter covered by the general law, i. e., taxation and exemption therefrom. See Code of Maryland, Supp. 1929, article 81, Section 6, paragraphs 1 and 2; section 7, paragraph 16; sec-

tion 7, paragraph 21. It would seem to require neither argument nor citation of authority to establish that this constitutional provision was intended to prevent exactly the sort of thing attempted by this statute, viz. the granting of special benefits or exemptions to particular individuals with respect to matters covered by the general laws of the state. The Starr Church Case is directly in point."

4. CHAPTER 497 IS NOT A LAW FOR SPECIAL PURPOSES, BUT A SPECIAL LAW.

The Petitioner contends that Chapter 497 is a law for special purposes and not a special Act prohibited by the Maryland Constitution.

To support this contention, the Petitioner relies upon Baltimore vs. United Railways & Electric Co., 126 Md. 39. It seems scarcely necessary to differentiate the facts in the 126 Md. case and the case at bar as their divergent character is clearly apparent. However, since the Petitioner devotes considerable argument to this contention, a self-evidence distinction will be made.

Baltimore vs. United Railways, supra, involved the constitutionality of Chapter 566 of the Acts of 1906, which was, in fact, an enabling act granting certain powers and rights to the City of Baltimore not theretofore possessed by the City of Baltimore. The object of the Act is set forth in its title as follows:

"An Act to modify. with the consent of the Board of Estimates, for a period of years, the Park Tax that may in certain events become payable by the United Railways and Electric Company of Baltimore upon the gross receipts that may in certain events be derived by it from the use by it for its corporate purposes of certain roads proposed to be acquired and opened as public highways by the Mayor and City Council of Baltimore in the Annex; to au-

thorize the Board of Estimates, in its discretion, to grant, in certain events, to said company the franchise or right of using said roads for its corporate purpose in perpetuity, and to modify in certain respects in relation to said roads, the present powers of the Board of Estimates in the matter of fixing the compensation for franchises or rights in public property."

This was unquestionably an Act for special purposes, as by its form and substance it was a grant of power to the municipality to accomplish certain things which could not be done by the municipality under the general laws. It was not an Act giving special advantages to a private corporation, as the Court said, page 51, "it was not a case of this appellee getting special advantages without paying for them, but it was the City that was profiting by the arrangement. * * * The City had no power under its Charter to have a graduated Park Tax, because it was simply authorized to impose the tax of nine per cent. on the gross receipts from public streets. It was therefore necessary to have some legislation on the subject, and it is manifest that such legislation was to the great advantage of the City. * * * The property wanted by the City belonged to the appellee, and no one can carefully read this statute without being convinced that it was passed in the interest of the City, and not for the benefit of the railway company."

The Court considered this Act as giving special powers to the City of Baltimore and that in effect it gave the City the right to enter into a contract with the United Railways. That the Court was actuated by these considerations in holding the Act constitutional is manifest from the following language of the Court on page 54:

"*As municipal corporations can only be chartered by special Acts of the Legislature, there is much*

> *more reason for sustaining such legislation as is now before us than that affecting private corporations, and as we have already said this Act was unquestionably primarily intended for the benefit of the City.* If this Act had simply authorized the City to enter into a contract with the railway company on such terms as it did make with it there would have been no reason to attack the Act on this constitutional ground, for surely the Legislature had that right, and that is the effect of the Act."

The Court held further that the exemption provided for in the Act "did not exempt the appellee from all taxes" (page 56), and that the temporary reduction of the park tax was part of a contract between the City and the United Railways from which the City received valuable considerations. In fact, the Court said, page 57, "by the arrangement it may be that the City saved enough to more than pay the difference between the graded tax and the nine per cent."

In brief, the Act of 1906 confirmed in 126 Md. 30 was an enabling act increasing the powers of the City of Baltimore and authorizing the City to enter into a contract with the United Railways from which it materially benefited. Certainly, it is not necessary to show the distinction between such an Act and Chapter 497, which is an Act conferring special privileges upon a private corporation, benefiting solely the bondholders and stockholders of this corporation which was organized only for pecuniary gain. The distinction between the two types of legislation is apparent, and the inapplicability of the adjudication on the first as precedent for the interpretation of the second, is so obvious that further discussion of this contention is futile.

See discussion of Littleton vs. Hagerstown, supra, and Baltimore vs. United Railways Company, supra, under Point III, subdivision 1 above.

The inapplicability of the case of Board of Police Commissioners vs. McClenehan, 131 Md. 315, to the case at bar is so selfevident that a discussion of their differences would be superfluous. In fact, the Circuit Court of Appeals said, 61 Fed. (2d) 374, 382:

> "We have examined the cases of Mayor, etc. of Baltimore vs. United Railways, 126 Md. 39, 94 A. 378, and Board of Police Com'rs. vs. McClenehan, 131 Md. 315, 101 A. 786, and we do not think that they are in point. In both, the acts in question were upheld on the ground that they dealt with matters not covered by general laws."

IV.

CHAPTER 497 IS IN CONFLICT WITH ARTICLE 3, SECTION 29 OF THE MARYLAND CONSTITUTION.

It has been shown that the only tax exemption statute approved by the Maryland Court of Appeals, since the Starr Church Case, was one which granted an exemption to a class and which was enacted as a public general law, its title expressly providing for the repeal and reenactment of a particular and specified section of a designated Article of the Maryland Code. Precisely the title provided: "An Act to repeal and reenact Section 159 of Article 81 of the Code of Public General Laws of Maryland, 1904, title 'Revenue and Taxes,' sub-title 'State Tax Commissioner.'" Baltimore vs. German American Fire Ins. Co., 132 Md. 380.

Now assuming, but not admitting, that the Legislature desired to constitute the Railroad Company as a class in itself, and without admitting that such a classification would be reasonable and constitutional, it is manifest that this result could only be accomplished by a public general law amending Article 81, Section 7 of the Annotated Code by adding a new paragraph thereto and pro-

viding for a new classification exempting railroad property such as that of the Washington, Baltimore and Annapolis Electric Railroad Company, when such a railroad company did not earn its operating charges for a given year or became insolvent. But even in such case, Chapter 497 would still be unconstitutional and void as the title of the same would then be misleading and deceptive and in violation of Article 3, Section 29 of the Maryland Constitution, as it would be in fact either an Act amendatory of a section of the Code of Public General Laws of Maryland or a new section added to Article 81 of the Code which is not mentioned in its title and to which neither the attention of the members of the Legislature nor the public was directed. Kafka vs. Wilkinson, 99 Md. 238; Weber vs. Probey, 125 Md. 544.

Article 3, Section 29 of the Constitution provides:

> "Sec. 29. The style of all laws of this State shall be, 'Be it enacted by the General Assembly of Maryland,' and all laws shall be passed by original bill; and every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title; and no law, or section of law, shall be revived or amended by reference to its title or section only; nor shall any law be construed by reason of its title to grant powers or confer rights which are not expressly contained in the body of the Act; and *it shall be the duty of the General Assembly, in amending any article or section of the Code of Laws of this State, to enact the same as the said article or section would read when amended. And whenever the General Assembly shall enact any public General Law, not amendatory of any section or article in the said Code, it shall be the duty of the General Assembly to enact the same, in articles and sections, in the same manner as the Code is arranged,* and to provide for the publication of all additions and alterations which may be made to the said Code."

The purpose of Section 29 of Article 3 is well defined in Weber vs. Probey, 125 Md. 544, at page 551, the Court saying:

> " * * * while, as said by Chief Judge Alvey in State vs. Norris, 70 Md. 91, 'this Court has ever been reluctant to defeat the will of the Legislature by declaring * * * legislation void, if by any construction it could possibly be maintained,' it is our plain duty to do so where there is a clear infraction of this wise and salutary provision of the organic law, the purposes of which, we have said, are to prevent 'Log-rolling' legislation; to give the people general notice of the character of the proposed legislation, so they may not be misled; to give all interested an opportunity to appear before committees of the Legislature and to be heard upon the advisability of the proposed legislation; to advise members of the character of the proposed legislation, and to give each an opportunity to intelligently watch the course of the proposed bill; to guard against fraud in legislation, and against false and deceptive titles.' Painter vs. Mattfeldt, 119 Md. 466."

The failure of the Legislature to follow the constitutional procedure here referred to seems to make it conclusive that the Legislature did not intend or purport to enact a public general law amendatory to or in addition to the general tax laws of Maryland. The Legislature intended to enact precisely what the expressed language of Chapter 497 denotes, i. e., a special Act conferring an individual privilege upon a designated corporation, the unconstitutionality of which, we have seen, is apparent on the face of the statue itself.

For a further discussion of this section of the Maryland Constitution see infra.

V.

CHAPTER 497 VIOLATES THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In addition to Chapter 497 being repugnant to the letter and spirit of the Maryland Constitution, it also violates the equal protection of the law clause of the Fourteenth Amendment of the United States Constitution. Chapter 497 makes no attempt at classification for the purpose of taxation or exemption from taxation, but indulges simply in an arbitrary selection of one corporation for the purpose of conferring an exclusive favor and privilege upon this corporation.

In Gulf, Colorado and Santa Fe Ry. Co. vs. Ellis, 165 U. S. 150, declaring an Act of the Texas Legislature unconstitutional, the Court said, page 159:

> "*Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency this statute cannot be sustained.*
>
> *But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this.*"

And at pages 165-166:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained."

In Louisville Gas & Electric Company vs. Coleman, 277 U. S. 32, the Supreme Court in declaring a statute of Kentucky void under the equal protection clause of the Fourteenth Amendment, said, page 37:

> "The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances. Kentucky Railroad Tax Cases, 115 U. S. 321, 337; Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 283, 293, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. County of Santa Clara vs. Southern Pac. R. Co., 18 Fed. 385, 388-399; The Railroad Tax Cases, 13 Fed. 722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. vs. Virginia, 253 U. S. 412, 415; Air-Way Corp. vs. Day, 266 U. S. 71, 85; Schlesinger vs. Wisconsin, 270 U. S. 230, 240. That is to say, mere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' Gulf, Colorado & Santa Fe Ry. vs. Ellis, 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

And at page 40:

> "The equal protection clause of the Fourteenth Amendment does not preclude a state in imposing taxes from making exemptions, *provided the power is not exercised arbitrarily.* It may exempt the property of churches, charitable institutions, and the like."

To the same effect, see Ohio Oil Co. vs. Conway, 281 U. S. 146; Quaker City Cab Company vs. Pennsylvania, 277 U. S. 389; Royster Guano Company vs. Virginia, 253 U. S. 412; Air-Way Corporation vs. Day, 266 U. S. 71; Schlesinger vs. Wisconsin, 270 U. S. 230, and Memphis & Charleston Ry. vs. Pace, 282 U. S. 241. See also: Baltimore vs. Starr Church, 106 Md. 281, and Baltimore vs Cahill, 126 Md. 596.

In Royster Guano Company vs. Virginia, 253 U. S. 412, this Court held that a discriminatory tax could not be sustained if the classification is wholly illusory.

In discussing the right of a State to classify property for taxation, this Court said in Michigan Central Railroad vs. Powers, 201 U. S. 245, 293: "It is enough that there is no discrimination in favor of one as against another of the same class."

Thus an unreasonable classification of property for taxation or exemption therefrom is prohibited by the Fourteenth Amendment. Certainly, an unreasonable discrimination in favor of one corporation must be more obnoxious to that amendment. A selection of the property of one corporation for exemption from taxation, with no attempt being made to classify the species of property entitled to the said exemption, can surely be only an arbitrary exercise of power by the Legislature and is a

denial of the equal protection of the laws guaranteed by the Federal Constitution.

In regard to this aspect of the case, the Circuit Court of Appeals said, 61 Fed. (2d) 374, at Page 378:

> "Testing the statute by the Fourteenth Amendment, we think that the equal protection of the laws is denied where the property of railroads generally is taxed and the property of one particular railroad is exempted from taxation. * * * Here there is no classification, but an arbitrary exemption is granted to a single taxpayer. It is said that the corporation is insolvent and that the service which it renders is of importance to the public; but exemption is not granted to other insolvent taxpayers or even to other insolvent railroads. So far as the public service rendered by the corporation is concerned, it should be remembered that its property is dedicated to the public use and the mere fact of insolvency does not justify the abandonment of its operation. Its property is still owned by some one (its real ownership is in bondholders and creditors) and is still used for railroad purposes; and the financial condition of the corporation holding the legal title furnishes no reasonable basis for exemption when property of others used for railroad purposes is taxed. If the property of all insolvents, or even of all insolvent railroads, were exempted from taxation, a different question would be presented; but, as stated above, we have no attempt at classification but an arbitrary individual exemption."

This Court, moreover, has held that where the character of the owner is the sole fact on which the distinction and discrimination are made to depend, such classification based upon ownership cannot be justified and fails to meet the requirements of a classification consistent with the equal protection of the laws clause. Quaker City Cab Company vs. Pennsylvania, 277 U. S. 389. In

that case this Court declared unconstitutional a tax laid on the receipts of corporations from the business of operating taxicabs, but imposing no tax on the same kind of business operated by individuals or partnerships, and said at page 400:

> "The equal protection clause does not detract from the right of the State justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' Power Co. vs. Saunders, 274 U. S. 490, 493. • • •

Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations as are taxes on their capital stock or franchises. It is not taken in lieu of any other tax or used as a measure of one intended to fall elsewhere. It is laid upon and is to be considered and tested as a tax on gross receipts; it is specifically that and nothing else.

In effect Section 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. *The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consstent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation.* Power Co. vs. Saunders, supra. No decision of this Court gives support to such a classification. In no

view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violates the equal protection clause of the Fourteenth Amendment. See The Railroad Tax Cases, 13 Fed. 722. County of Santa Clara vs. Southern Pacific R. R. Co., 18 Fed. 385. Northern Pacific R. Co. vs. Walker, 47 Fed. 681. The tax cannot be sustained."

Following the reasoning of this Court, the Circuit Court of Appeals in 61 Fed. (2d) 374, 379, aptly said:

> *"Here the exemption rests upon no classification whatever except the ownership of the property by the railway company. Other railroads, even insolvent railroads, are not classified with it or given a like exemption. 'The Fourteenth Amendment protects those within the same class against unequal taxation; all are entitled to like treatment.'* Hopkins vs. Southern California Telephone Co., 275 U. S. 393, 403, 48 S. Ct. 180, 183, 72 L. Ed. 320. *By the exemption in question this like treatment is denied."*

A most recent and illuminating application of this doctrine is found in the case of Kelman vs. Ryan, decided by the Maryland Court of Appeals January 3, 1933, in which the Court held unconstitutional an Act providing for the attachment of wages, salaries and/or commissions for the payment of judgments for groceries and food supplies, as denying the equal protection of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution, saying:

> "The question here presented is whether the Act in question is a valid enactment under Section 1 of the Fourteenth Amendment to the Constitution of the United States, which 'guarantees the equal protection of the laws.' This amendment of the Constitution was intended to secure equality of right, and it renders unconstitutional all laws, unless passed under the power of police regulation, which may

properly be construed as applying to some persons of a class, when it does not apply to others of the same class or of a like situation, and between which there is no reasonable difference warranting such discrimination.

It is recognized and established by the Courts of this country, both Federal and State, that the Legislature may, under conditions, create classes and subject all persons coming within the classifications to burdens or duties not imposed upon individuals outside of the classes, or may confer rights and privileges upon those within the classes that are not enjoyed by others not embraced therein. These classifications, however, must not be arbitrary or unreasonable, but must rest upon some difference which bears a reasonable and just relation to the act—the thing—in respect of which the classification is proposed. Or as otherwise stated, '*a statute which denies to one person the protection that is accorded to others under the same conditions and in the like situation, or which imposes on one person a burden not similarly borne by others is in both instances invalid under the paramount organic law because of its discrimination.*' Luman vs. Hitchens Bros. Co., 90 Md. 14; State vs. Potomac Coal Co., 116 Md. 401; Clark vs. Harford Agri. & Breed. Assn., 118 Md. 621; Storck vs. Baltimore City, 101 Md. 486; Criswell vs. State, 126 Md. 108; Keller vs. State, 122 Md. 684; Watson vs. State, 105 Md. 657; Kenneweg vs. Allegany County, 102 Md. 127; Hayes vs. Missouri, 120 U. S. 68 (L. Ed. 578); Barber vs. Connolly, 113 U. S. 27 (L. Ed. 923); St. Louis & San Francisco Railway Company vs. Mathews, 165 U. S. 1 (L. Ed. 611); 12 Corpus Juris 1146; Cooley on Constituttional Limitations 249.

In deciding this case we are to determine whether there are persons not named in the statute who are by it wrongfully denied the equal protection of the laws. In Criswell vs. State, supra, this Court said: 'What satisfies this equality has not been and probably never can be precisely defined. Generally it

has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' Kentucky Railroad Tax Cases, 115 U. S. 321.'

The rights and privileges conferred by the statute are confined to those to whom the debtor is indebted for 'groceries, food-stuffs, meats, provisions and other food supplies, for household use of the defendant, or defendants, his, her or their family and for the boarders or guests of the defendant or defendants.'

So far as we are able to discover there is no apparent reason why the statute should confer privileges upon vendors of the articles mentioned therein, and not upon those extending credit for other necessaries of life, including fuel, clothing and medical services.

The Act also subjects employers of persons indebted for the articles named in this statute to burdens in the settlement of wages owing their employees, to which no other class of employers are subjected, including those employers of debtors for other essentials or necessaries of life.

The discriminations created by the Act do not rest upon a substantial or recognizable difference between the class embraced and the class excluded, or, as stated by Judge McSherry in Luman vs. Hitchens, supra, they do not rest upon some difference 'which bears a reasonable and just relation to the act—the thing—in respect to which the classification is proposed.'

In our judgment the classification embraced in the Act is arbitrary and unreasonable, and for such reason the Act violates the Fourteenth Amendment of the Constitution of the United States."

It is submitted, therefore, that the Act here in question is as repugnant to the Federal Constitution as it is to the Maryland Constitution.

B. *Payments Due Under Franchise Ordinance Not Within the Purview of Chapter 497.*

I.

PAYMENT MADE UNDER A FRANCHISE ORDINANCE NOT A TAX.

Moneys due the City of Baltimore under Franchise Ordinance No. 123, approved April 27, 1906,* as compensation for the use of the City streets, are payments made under a contract between the City of Baltimore and the Railroad Company, and are not within the scope of the attempted exemption of the railroad property of the Railroad Company from taxes and charges in the nature of a tax. Consequently, Chapter 497 does not affect the liability of the Railroad Company with regard to such payments. It is to be noted, as said by the Circuit Court of Appeals, 61 Fed. (2d) 374, 376, "that it is 'the railroad property' which is exempted from taxation; and it is exempted, so far as cities are concerned only from 'city taxes and charges in the nature of a tax'."

As defined by this Court in United States vs. La Franca, 282 U. S. 568, a tax is "an enforced contribution to provide for the support of government."

And in 26 R. C. L., 13, it is said:

> "A tax is an enforced contribution of money or other property assessed in accordance with some reasonable rule of apportionment, by authority of a sovereign state on persons or property within its jurisdiction, for the purpose of defraying public expenses."

An enforced contribution for the purpose of defraying public expenses differs materially from a sum paid to a

* (Record, pp. 3-4 and above under Statement of Case.)

municipality under a contract between the City and a railroad company, in that the latter arises out of a contractual agreement between the parties, while the former depends for its validity, not upon the consent of the party liable for its payment, but upon the sovereign power of the State itself. An enforced contribution for public purposes is, therefore, a tax, while the payments made by the Railroad Company to the City of Baltimore for the use of the streets are not taxes, but are in the nature of charges for the use of property belonging to the City and are in the same category as water rent imposed by the municipality upon its citizens for the furnishing of water, fees exacted for the use of sewers and charges made for the use of municipal wharves, which have been held by this Court not to be taxes.

The distinction between a tax and the payment under a franchise ordinance for the use of City streets is clearly and exhaustively covered by the Circuit Court of Appeals, 61 Fed. (2d) 374, where it is said, page 376:

> "It (a tax) differs from a payment due under a contract in that the latter arises out of the agreement of the party from whom it is due, whereas a tax depends not upon consent but upon the sovereign power of the state. State Freight Tax Cases, 15 Wall. 232, 278. A charge exacted by a city for the use of its streets is not a tax. 'It is more in the nature of a charge for the use of property belonging to the city —that which may properly be called rental. * * * That by it the city receives something which it may use as revenue, does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes.' St. Louis v. Western Union Tel. Co., 148 U. S. 92, 97; Postal Tel. Co. v. Mayor etc. of Baltimore, 79 Md. 502, 24 L. R. A. 161; Mayor etc. of Baltimore v. Baltimore etc. R. Co., 84 Md. 1, 33 L. R. A. 503; City of Springfield v. Postal

Tel Co., 253 Ill. 346, 97 N. E. 672; Postal Tel. Co. v. City of Newport, 25 Ky. L. Rep. 635, 76 S. W. 159; 26 R. C. L. 14. And see McQuillan Municipal Corporations 2d Ed. vol. 4, sec. 1772, where the rule as to requiring compensation upon the granting of a franchise is stated as follows:

'A municipal corporation, having entire control of its streets and power to impose conditions on granting a franchise to use the streets, may require compensation for their use by public service companies, as a condition of the grant of the right to use them, unless forbidden by statute, as by requiring the company to pay a certain portion of its receipts as compensation for the use of streets, or a certain per cent of the dividends declared, or exacting a license fee of a certain sum for each car to be paid annually to the city, or an annual tax on each mile of its tracks.

* * * So if the grant of the right to use streets is conditioned on the payment of a certain sum per year, the fact that such charge is called a license tax does not make it such, within the rule that license taxes must be imposed equally on all persons engaged in the same business.'

A payment required as a condition of the granting of a franchise to use the streets of a city is not different in principle from the exaction of any other payment by a city as a return for the use of property or facilities furnished by it; and it is uniformly held that such payments are not taxes and are not governed by the rules relating thereto. Thus, the water rent imposed by a city for water which it furnishes is not a tax (Jones v. Detroit Water Com'rs, 34 Mich. 273); nor is a fee imposed for the use of a sewer (Carson v. Brockton Sewerage Com., 182 U. S. 398, 400); nor is a charge for the use of municipal wharves (Parkersburg v. Parkersburg Trans. Co., 107 U. S. 691; nor a toll for the use of an improved highway (State Freight Tax Cases, supra). In St. Louis v. United Railways Co., 210 U. S. 266, 278, the Supreme Court, speaking through Mr. Justice

Day, makes clear the difference between payments required as the condition of granting a franchise and the imposition of a franchise tax. He says:

'It is true that the city in granting the right to use the streets by special ordinance and in exercising by general ordinance the right conferred in the charter to impose a license tax upon cars is dealing with rights and privileges somewhat similar, but, nevertheless, essentially separate and distinct. In the special ordinances the city is making an arrangement with the railway company to confer the right to use the streets in consideration of certain things the company is to do by way of operation and otherwise, including, it may be, payment of fixed sums or a proportion of receipts in consideration of the rights and privileges conferred. The city does this by virtue of its power to grant rights and privileges and control their exercise in the streets of the city, power expressly conferred in the charter of the city. In the fixing of a license tax upon all companies alike for the privilege of using cars in the city, it is exerting other charter powers. It makes provision uniformly applicable to all persons or companies using street cars. It is a revenue measure equally applicable to all coming within its terms.' "

The payments required to be made to the City of Baltimore under Section 13 of Ordinance 123 are "in consideration of the several rights, privileges and franchises herein granted," and under Section 15 of the ordinance the term "compensation" is applied to the amounts payable by the Railroad Company, while in Section 14 of the ordinance it is provided that in the event of failure on the part of the Railroad Company to comply with the terms of the ordinance all the rights, privileges and franchises granted to the Railroad Company shall become void. It will also be noted that Section 15 of the ordinance pro-

vides, inter alia, that the compensation payable to the City of Baltimore by the Railroad Company for the use of the streets shall not prejudice the contention of the City with reference to the assessability and taxability of street franchises or easements. The language of the ordinance ipso facto demonstrates that at the time the ordinance was passed and accepted by the Railroad Company, it was not the intention to levy a tax, but to create a contractual obligation. Such was the interpretation of the Circuit Court of Appeals, 61 Fed. (2d) 374, page 377, where it said:

> "There can be no question but that the ordinances here under consideration did not impose license taxes but provided for payments as a matter of contract in return for the privileges and franchises granted. The section requiring the payments provides that same are to be made 'in consideration of the several rights, privileges and franchises herein granted'; the following section provides that upon failure of the grantees to comply with the terms and conditions of the ordinances the rights, privileges and franchises granted shall be avoided; and the last section refers to the provision requiring payment of a portion of the fares collected and a percentage of receipts from freight, etc. as 'the provision herein for compensation to the city.' This shows clearly, not only that the city was making a contract and not levying a tax, but also that this was thoroughly understood at the time. The fact that the ordinance speaks of a 'tax' on each fare and a 'tax' on receipts from freight etc. is immaterial. The nature of the payment provided for in the ordinance depends upon the right under which same is demanded, not upon what the parties may have called it. Postal Tel. Co. v. Newport, supra; Lipke v. Lederer, 259 U. S. 557, 561; Child Labor Tax Case, 259 U. S. 20."

II.

PAYMENT MADE UNDER FRANCHISE ORDINANCE NOT A CHARGE IN THE NATURE OF A TAX.

And likewise, a payment made pursuant to the ordinance is no more a charge in the nature of a tax than it is a tax, for the reason that such payment is not a charge exacted under the exercise of the sovereign power of the State, but is a payment arising out of a contractual obligation consented to by the payee. Payments under the ordinance are charges made for the privilege of using City property, and it was so held by this Court in St. Louis vs. Western Union Telegraph Co., 148 U. S. 92, where it was said that the municipal charge for the use of streets of the municipality by a Telegraph Company erecting poles therein "is imposed for the privilege of using the streets, alleys and public places * * *. Clearly this is no privilege or license tax. *It is more in the nature of a charge for the use of property belonging to the city*—that which may be properly called rental. A tax is a demand of sovereignty; a toll is a demand of proprietorship, State Freight Tax Case, 15 Wallace, 232, 278 * * *. That by it the City receives something which it may use as revenue, does not determine the character of the charge or make it a tax * * * (98). That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section."

In this respect, the Circuit Court of Appeals said, 61 Fed. (2d) 374, 377:

> "And we do not think that the payments required by the ordinance can be said to be 'charges in the nature of a tax.' As pointed out by the Supreme Court in the case of St. Louis v. Western Union Tel. Co. supra, they are charges in the nature of rent. A charge in the nature of a tax is a charge exacted

by the state in the exercise of its sovereign power, such as a special assessment against property specially benefited by a public improvement, or the case mentioned in the statute itself of enforced contribution to the cost of construction of railroad crossings. Payments required by contract in consideration of the use of public property are in no sense charges in the nature of a tax.

Since the statute upon which the receiver relies relieves only against taxes or 'charges in the nature of a tax,' and since the payments required by the franchise ordinances do not fall within either classification, it clearly has no application to them."

III.

CHAPTER 497 DOES NOT ATTEMPT TO EXEMPT FROM TAXATION THE BUSINESS DONE BY THE RAILROAD COMPANY.

Chapter 497 does not attempt to exempt the business done by the Railroad Company. It only attempts to relieve from taxation the "railroad property * * * of the company * * * used for railroad purposes." Under the rule of strict construction applicable to this case, a statute designed and purporting to exempt railroad property from taxation cannot be enlarged to include excise taxes or taxes on the business of a company, assuming that the payments under the franchise ordinance may be construed as such. The charge imposed by Ordinance No. 123 is determined by the amount of business transacted by the Railroad Company, i. e., a specified charge on every passenger and a stipulated percentage of the gross receipts derived from designated freightage carried by it.

As expressed by the Circuit Court of Appeals, 61 Fed. (2d) 374, 377, in regard thereto:

"But there is yet another reason why they are not affected. It is only the property of the railway company which is relieved of taxes, not the business

which it does; and, even if the payments required by the ordinances be regarded as taxes, they are not taxes on the property of the railroad but on business done by it. As the statute does not profess to relieve against excise taxes, or taxes on business, they are clearly not affected. A statute relieving against taxes on property will not be construed to cover excise or franchise taxes; for it is elementary that exemptions from taxation must be strictly construed. Vicksburg etc. R. Co. v. Dennis, 116 U. S. 665; Berryman v. Whitman College, 222 U. S. 334, 350; 26 R. C. L. 274."

IV.

UNITED RAILWAYS CO. VS. BALTIMORE, 111 MD. 264, IS IN ACCORD WITH DECISION OF CIRCUIT COURT OF APPEALS IN THIS CASE.

It is asserted by the Petitioner in his petition for a writ of certiorari that "the decision of the Court below in holding that the Act under construction 'has no application to the moneys due by the Railroad Company under the franchise ordinances' for the reason that said ordinances did not impose taxes or charges in the nature of a tax, disregards the decision of the Court of Appeals of Maryland in the case of United Railways Company vs. Baltimore City, 111 Md. 264, in which the precise contrary was held."

In fact, the case of United Railways Co. vs. Baltimore, 111 Md. 264, actually is in accord with the decision of the Circuit Court of Appeals and the views expressed herein, as it is said in 111 Md. 268:

> "*We*, of course, *affirm* what was said in those cases (71 Md. 405, 84 Md. 1 and 107 Md. 250), to the effect *that the Park Tax was a franchise tax exacted in exchange for the privilege accorded the street railway companies to lay their rails and run their cars upon*

> *city streets.* But the language of these cases must be considered with reference to the questions then before the Court. In none of them was any question concerning the separate taxation of easements as distinguished from franchises presented."

What is thereafter said in the 111 Md. case deals with the question of the separate taxation of easements as distinguished from franchises, and the decision therein must be limited to that question. As such, it has no applicability to the case at bar, nor does it affect the principle established by Baltimore Union Passenger Ry. Co. vs. Baltimore, 71 Md. 405, Park Tax Case, 84 Md. 1, and Baltimore vs. United Railways Co., 107 Md. 250, i. e., that the so-called tax imposed by Ordinance No. 123 was, in the language of the Maryland Court of Appeals in 84 Md. 1, 16, "laid and collected in consideration of the privilege or franchise granted by the City to the several street and railway companies to lay their tracks and to run their cars upon the public thoroughfares of the City."

The case of United Railways Co. vs. Baltimore, 111 Md. 264, is authority solely for the proposition that inasmuch as a tax is imposed upon the gross receipts of the street railway companies in Baltimore City for the use of the City streets, no other tax upon the easements or franchises of the companies or their right to occupy the streets can be assessed against them without the City first obtaining special legislative authority.

Of course, in this case, the question is not the imposition of an additional tax upon the easements or franchises of the Petitioner, but the nature of the payments required under Ordinance No. 123, in which respect, the 111 Md. case is in complete agreement with the decision of the Circuit Court of Appeals below.

C. *If Payments Under Franchise Ordinance Be Construed As Within Its Scope, Then Chapter 497 Further Violates The Federal And Maryland Constitutions.*

I.

CHAPTER 497 VIOLATES ARTICLE 3, SECTION 29 OF THE MARYLAND CONSTITUTION.

It has been shown that a tax or a charge in the nature of a tax is separate and distinct from a payment due under a contract as compensation for the privilege of using City streets for railroad purposes. In fact, a tax or a charge in the nature of a tax and a franchise payment are two entirely different matters. If Chapter 497 be construed as relieving the Railroad from taxes on its property, and also from payments due under a contractual liability, arising from the franchise to use City streets, Chapter 497 would be violative of Article 3, Section 29 of the Maryland Constitution, which requires that "every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title."

Moreover, it has been shown that a tax on the property of a corporation and the so-called tax, if the franchise payments may be termed such, on the business which the corporation does, are also two dissimilar subjects, which if embodied in one Act, would infringe upon the constitutional limitations imposed upon the Legislature by Article 3, Section 29.

Chapter 497 purports only to exempt "the railroad property of the * * * Electric Railroad Company * * * from all City taxes and charges in the nature of a tax" and the title of the Act so indicates. If this Act is interpreted by the Court as embracing the several subjects

herein referred to, it ipso facto becomes repugnant to Article 3, Section 29. If such construction is given to Chapter 497, its title is misleading and deceptive because one reading it would be led to believe that only the property of the Railroad Company used for railroad purposes was to be exempted from City taxes and charges in the nature of a tax; whereas, in fact, under such construction, the exemption extended to payments made under a contractual agreement for the privilege of using the streets of Baltimore, upon which latter subject the title is silent and insufficient. The title of Chapter 497 not only failed to express any intention of bringing within the scope of the Act, payments under franchise ordinances, but by limiting the notice of its contents to taxes or charges in the nature of taxes on railroad property, it diverted attention from such. State vs. The Schultz Co., 83 Md. 58; Luman vs. Hitchens Bros. Co., 90 Md. 14; Painter vs. Mattfeldt, 119 Md. 466; Weber vs. Probey, 125 Md. 544, and Culp vs. Comrs. of Chestertown, 154 Md. 620.

The case of Luman vs. Hitchens Bros. Co., 90 Md. 14, is very much in point. It is said therein, Page 23:

> "The title declares that the Act is an Act to prohibit railroad and mining corporations, their officers and agents, from selling goods, wares and merchandise to their employees; whereas, the body of the Act makes it unlawful not only for a railroad and a mining corporation to sell or barter any goods, wares or merchandise, but for any president, vice-president, manager, superintendent, director or other officer of such corporations to own or have any interest whatever in any store or merchandise business in Allegany County, without the slightest reference to whether sales are made to the employees of railroad or mining corporations or not. *There are two things prohibited in the body of the Act under a title indicating a purpose to prohibit but one thing; and that*

one thing is a wholly different thing from the two which are prohibited. The title relates to sales to employees; the body of the Act prohibits railroad and mining corporations from selling at all; and it also, without qualification, prohibits the designated officers from having any interest in any store, and from selling to any person any goods, wares or merchandise in the county. *The title indicates that the Act is designed to provide a restricted prohibition, whilst the body of the Act declares an unrestricted prohibition.* A provision forbidding a sale to employees is widely different from, because much narrower than, a provision forbidding a sale to any one. *Though the title need not contain an abstract of the bill, nor give in detail the provisions of the Act, it must not be misleading by apparently limiting the enactment to a much narrower scope than the body of the Act is made to compass; nor must there be cloaked in the enactment any foreign, discordant or irrelevant matter not disclosed in the title.* No one reading a title which was confined to a prohibition against particular persons selling to their employees would ever infer that the thing actually prohibited in the Act itself was a sale by those persons to any one. The wisdom of requiring the title to disclose the subject of the statute and confining the Act to that one subject is illustrated by the legislation now before us. It may well be (assuming such legislation would be free from other infirmities) that there could be no objection to prohibiting officers of railroad and mining corporations from selling merchandise to their employees, while there would be very serious objections to prohibiting such officers from selling to other persons. *The Act goes far beyond the purpose declared in its title,* and in this respect disregards the provisions of sec. 29, Art. 2 of the Constitution of Maryland, which declares 'that every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title.' * * * In the case at bar the title of the Act relates to a particular prohibition and the effort is to include under that a general, or at least, a very much broader prohibition in the body of the Act."

The purpose of this constitutional provision is well summarized with a citation of earlier decisions in the recent case of Culp vs. Comrs. of Chestertown, 154 Md. 620, where it is said, Page 624:

> "The third objection urged by the appellants, namely, that the act violates section 29 of Article 3 of the Constitution, is sound, and this renders the act fatally defective. This constitutional provision is that every law enacted by the General Assembly shall embrace but one subject and shall be described in its title. This language has probably been more productive of litigation than any other section of our State Constitution, much of which has reached this court and been the subject of numerous decisions. We do not propose to review any great number of these decisions, because they have little force as precedents except in so far as they settle principles of constitutional and statutory construction. These rules are succinctly laid down by this court, speaking through Judge Burke, in the case of Painter v. Mattfeldt, 119 Md. 463, with the authorities in this court and elsewhere supporting the principles therein stated. *The authorities hold that section 29 of article 3 of the Constitution is mandatory,* but that the general disposition of this court has been to give this section a liberal construction so as not to interfere with or impede legislative action; that the title of an act, whilst it must indicate the subject, need not give an abstract of the act, yet *it must not be misleading by what it contains or what it omits.* The purpose of this constitutional provision has been declared to be to prevent separate and incongruous subjects from being contained in one act, and thereby preventing 'log-rolling' legislation; to give the people general notice of the character of the proposed legislation, so they may not be misled; to give all interested an opportunity to appear before the committees of the Legislature and be heard upon the advisability of the proposed legislation; to advise members of the character of the proposed legisla-

tion, and to give each an opportunity to intelligently watch the course of the proposed bill; to guard against fraud in legislation and against false and deceptive titles. Stiefel v. Md. Institute for the Blind, 61 Md. 144; State v. Morris, 70 Md. 91; Whitman v. State, 80 Md. 410; Kafka v. Wilkinson, 99 Md. 238; Christmas v. Warfield, 105 Md. 530; Somerset County v. Pocomoke Bridge Co., 109 Md. 1; Nutwell v. Anne Arundel County, 110 Md. 667; Curtis vs. Mactier, 115 Md. 383; Painter v. Mattfeldt, supra; Weber v. Probey, 125 Md. 544. *The enforcement of this constitutional provision in proper cases is a mandate upon the judiciary, and is essential to accomplish the purposes which this court has determined were intended by the framers of the Constitution.*"

For a further discussion of Article 3, Section 29, see above, Point A, IV.

II.

CHAPTER 497 IS IN CONFLICT WITH THE HOME RULE AMENDMENT (ARTICLE 11-A) OF THE MARYLAND CONSTITUTION.*

Ordinance No. 123 of the Mayor and City Council of Baltimore, approved by the Mayor April 27, 1906, granted the right to the Railroad Company to construct, maintain and use the railway tracks, with the necessary curves and connections, over certain streets in the City of Baltimore, and to operate cars over and upon the tracks authorized to be constructed, and provided the condition upon which said rights should be exercised and the compensation to be paid therefor. Section 13 of this ordinance provided for the consideration to be paid the Mayor and City Council of Baltimore for this franchise. (See Record, pp. 3-4, and above under Statement of Case).

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* See Appendix B.

The passage of this ordinance and the acceptance thereof by the Railroad Company created a valid contract, the conditions therein binding both the municipality and the Company the same as the terms of any other contract. C. & P. Telephone Co. vs. Baltimore, 89 Md. 689.

This contract was made by the City in its private, proprietary capacity and pursuant to the power expressly conferred upon it by its Charter to regulate the use of streets and highways and to grant specific franchises and rights in or relating to its streets and highways.

The Charter of Baltimore City provides, Section 6, Sub-section 26-G, that the Mayor and City Council of Baltimore shall have full power and authority "to regulate the use of streets, highways, roads, public places and sidewalks by foot passengers, animals, vehicles, cars, motors and locomotives, and prevent encroachment thereon and obstruction of the same."

Section 7 of the Charter stipulates:

> "The title of the Mayor and City Council of Baltimore in and to its water front, wharf property, land under water, public landings, wharves and docks, highways, avenues, streets, lanes, alleys and parks is hereby declared to be inalienable."

And Section 8 provides:

> "The Mayor and City Council of Baltimore may grant for a limited time and subject to the limitations and conditions contained in this Charter, specific franchises or rights in or relating to any of the public property or places mentioned in the preceding section."

These powers have been expressly granted to the City of Baltimore by the State Legislature, and are a part of

the Charter of Baltimore, which is protected by the Home Rule Amendment (Article 11-A of the Maryland Constitution), the purpose of which is expressed in State vs. Stewart, 152 Md. 419, at page 422, as follows:

> "Article 11A of the Constitution of Maryland, known as the Home Rule Amendment, was adopted by a vote of the people of the state in November, 1915, pursuant to the provisions of chapter 416 of the Acts of the General Assembly of 1914. The wisdom of incorporating in the organic law of the state such provisions as are contained in this article had been urged for a number of years prior to its adoption, the reasons assigned by its proponents being that a larger measure of home rule be secured to the people of the respective political subdivisions of the state in matters of purely local concern, in order that there should be the fullest measure of local self-government, and that these local questions should thus be withdrawn from consideration by the General Assembly, leaving that body more time to consider and pass upon general legislation, and to prevent the passage of such legislation from being influenced by what is popularly known as 'log-rolling'; that is, by influencing the attitude and vote of members of the General Assembly upon proposed general laws by threatening the defeat or promising the support of local legislation in which a particular member might be peculiarly interested."

Under the Home Rule Amendment, Article 11-A, Section 2, the General Assembly has full power to designate any subjects in respect to which the power of the Legislature is delegated to the local authorities, and there is reserved to the Legislature the power and authority to extend, modify, amend or repeal the powers theretofore granted. However, so long as the powers granted to the City remain unchanged, the field of local legislation in respect to those powers granted in the Charter is exclusively in the local authorities and denied to the State

Legislature. If the Legislature desires to amend, repeal or abridge these powers, it can do so, but it must do so directly by repealing or amending the power expressly granted. It cannot accomplish the same purpose by merely passing an Act collaterally restricting and limiting the exercise or operation of the Charter powers. State vs. Stewart, 152 Md. 419, wherein the Court said, page 424:

> *"If the General Assembly, in its grant of powers to Baltimore City, subsequently concludes that the grant of powers contained a subject upon which the General Assembly should have authority to legislate, and not the city authorities, it can only accomplish this by amending or repealing the act granting and delineating the powers. The Legislature has the power to describe the field within which the local authorities may legislate, but having once done this, it cannot restrict or limit this field of legislation without changing its boundaries. The legislation in respect to the subjects contained in the granted powers is therefore committed exclusively to the local authorities and denied to the General Assembly, so long as the grant of powers remained unchanged. Any other interpretation would render the provisions of Article 11A meaningless, and result in nullifying the purpose sought to be accomplished by its adoption. If the Legislature could change the grant of power by the simple expedient of passing an act in conflict with the legislation of the local authorities, it would result in the complete frustration of the object of the amendment."*

Section 3 of Article 11-A provides "from and after the adoption of a charter by the City of Baltimore * * * the Mayor * * * and City Council, subject to the Constitution and public general laws of this State, shall have full power to enact local laws of said City * * * including the power to repeal or amend local laws of said City

* * * enacted by the General Assembly, upon all matters covered by the express powers granted as above provided * * *."

Section 4 of Article 11-A provides "from and after the adoption of a charter under the provisions of this Article by the City of Baltimore * * *, no public local law shall be enacted by the General Assembly for said City * * * on any subject covered by express powers granted as above provided."

The gross receipts tax on street railways in Baltimore City, similar to the franchise charge provided in Ordinance No. 123 of 1906, has been considered by the Maryland Court of Appeals on several occasions—Baltimore Union Passenger Ry. Co. vs. Baltimore, 71 Md. 405; the Park Tax Case, 84 Md. 1; Baltimore vs. United Railways Co., 107 Md. 250; United Railways Co. vs. Baltimore, 111 Md. 264—in which it was characterized as "a franchise tax exacted in exchange for the privilege to the street railway companies to lay their railways and run their cars upon City streets." United Railways Co. vs. Baltimore, 111 Md. 264, 268.

In The Park Tax Case, 84 Md. 1, the Court said, page 16:

> "Since the decision by this Court of the case of Balto. U. P. Ry. Co. v. M. & C. C. Balto., 71 Md. 405, there can be no question that the tax thus imposed was laid and collected in consideration of the privilege or franchise granted by the city to the several street railway companies to lay their tracks and to run their cars upon the public thoroughfares of the city. 'The nine per cent. tax * * * has been imposed for the privilege accorded by the city to the appellant of using its streets for railway purposes.' 71 Md. 413. There is no pretence that the tax was ever imposed or collected either in respect of gross

earnings received from suburban travel, or in respect of such earnings accrued to any other railway than one located and operated upon a public street of the city. The history of the legislation relating to this subject would, apart altogether from the explicit language used in 71 Md. supra, be sufficient to demonstrate, we think, that the tax was a franchise tax exacted in exchange for the privilege accorded these several companies to lay their rails and run their cars upon city streets—*streets subject to the control of the Mayor and City Council of Baltimore and subject to no other dominion whatever.* This is emphasized by the ordinance which reduced the rate of the tax to twelve per cent., for it provided that the several railway companies named in it (and the appellee is not included) should be required to pay to the City Register twelve per cent. of their gross receipts 'in lieu of the one-fifth as now required under their respective grants.' Clearly this language indicates, if it does not expressly declare, that the tax was the equivalent for the grant."

Under Article 11-A, and the City Charter adopted thereunder, full and exclusive dominion over the purely local matter of control of City streets and franchises for the use thereof is vested in the City of Baltimore. The General Assembly of Maryland cannot interfere with the exercise of this power.

Chapter 497 directly contravenes local legislation, Ordinance No. 123 of 1906, enacted pursuant to Section 8 of the City Charter, which still remains in full force and effect. It relieves the Railroad Company from paying the consideration provided for by Ordinance 123 as compensation for the franchise right therein granted. Chapter 497 does not attempt to amend or repeal Section 8 of the Charter. It does, however, directly restrict and limit the property rights of the City of Baltimore obtained through the exercise of the power to grant franchises expressly provided for by Section 8 of the City Charter.

Therefore, the Legislature by Chapter 497 attempted to change the Charter powers of Baltimore City in a manner not contemplated by the Maryland Constitution and manifestly contrary to the objects and purposes of the Home Rule Amendment.

Chapter 497 is, therefore, null and void so far as it affects the compensation due the City of Baltimore from the Railroad Company under the franchise granted by Ordinance No. 123.

III.

CHAPTER 497 FURTHER VIOLATES THE FEDERAL CONSTITUTION AS IT RESULTS IN AN IMPAIRMENT OF THE OBLIGATION OF CONTRACTS.

We have seen in the foregoing chapter (C-II) that under Article 11-A of the Maryland Constitution and the Charter of the City of Baltimore adopted pursuant thereto, the City of Baltimore has exclusive dominion over the streets of the City and the franchises granted therein, upon which control and jurisdiction the Legislature of Maryland cannot intrude. By virtue of the exclusive nature of its power over its streets and over the grant of franchises therein, and for the use thereof, the City has all of the rights, and the same rights, of ownership, control and disposition with respect to its streets, as private owners have with respect to privately-owned properties. The Baltimore City Charter, Section 6, Subsection 26-A, provides, inter alia, that the Mayor and City Council of Baltimore shall have full power and authority "to acquire the fee-simple interest in any land for the purpose of opening, extending, widening or straightening, in whole or in part, any street, square, lane or alley in Baltimore City." As noted above, Section 7 of the City Charter provides that "the title * * * of Baltimore in and to its * * * highways, avenues,

streets, lanes and alleys * * * is hereby declared to be inalienable." And also, Section 8 provides that the City may grant specific franchises or rights in or relating to said streets, etc. Thus, these private property rights may be in the form of fee-simple interest in land or a payment due under a franchise ordinance as a charge to a public utility company for the use of the City streets. In either case, the City is fully protected by the Maryland Constitution against legislative interference in the exercise and enjoyment of its proprietary rights to direct and control the use of City streets.

Therefore, it is apparent that the State of Maryland has conferred on the City of Baltimore a distinctive private proprietary capacity in respect to its streets and the franchise rights granted therein, as the result of which, the City may acquire contract or property rights protected by the Federal Constitution against subsequent impairment by its creator, the State. Boston vs. Jackson, 260 U. S. 309, 316; Commissioners vs. Lucas, 93 U. S. 108, 114; State vs. Stewart, 152 Md. 419; Mount Hope Cemetery vs. Boston, 158 Mass. 509; Adams vs. Plunkett, 274 Mass. 453.

In Boston vs. Jackson, 260 U. S. 309, this Court said, page 316:

> "We assume * * * that the State may confer on one of its subdivisions like a city or town the private proprietary capacity by which it may acquire contract or property rights protected by the Federal Constitution against subsequent impairment by its creator the State."

The State may confer upon municipalities "power to own, maintain and operate public utilities, such as waterworks, gas and electric plants, street railway systems,

public markets, and the like * * *. For the purpose of carrying on such activities, they are given power to hold and manage personal and real property." Trenton vs. New Jersey, 262 U. S. 182, 186; Hagerstown vs. Littleton, 143 Md. 591; Dinneen vs. Rider, 152 Md. 343. The Respondent respectfully submits that under Article 11-A of the Constitution of Maryland and the Baltimore City Charter adopted thereunder, the City of Baltimore has similar power in respect to its streets and the granting of franchises therein. It is submitted that in the exercise of such power, the municipality may acquire contract rights, the impairment of which would be prohibited by the contract clause, Article 1, Section 10, Clause 1, of the Federal Constitution. Boston vs. Jackson, 260 U. S. 309.

Moreover, it might be added that the taking or diverting of private property, i. e., contract rights in the nature of payments due as compensation for the use of the City streets, acquired by the municipality in the exercise of such power, would violate the Fourteenth Amendment of the Federal Constitution as a deprivation of property without due process of law and without just compensation. See note 56 A. L. R. 376 and cases there cited; Hunter vs. Pittsburgh, 207 U. S. 161, 179; Commissioners v. Lucas, 93 U. S. 108, 114. And in passing, it is suggested that for the same reason Chapter 497 is in violation of the Maryland Constitution, Article 3, Section 40, providing that "the General Assembly shall enact no law authorizing private property to be taken for public use, without just compensation as agreed upon between the parties, or award by a jury, being first paid or tendered to the party entitled to such compensation," inasmuch as it has been held that this section impliedly prohibits the taking of private property for private use. Pitznogle vs. Western Md. R. R. Co., 119 Md. 673, 677; 56 A. L. R. 376 N.

This Court said in Hunter vs. Pittsburgh, 207 U. S. 161, at page 179:

> "Such corporations (municipal) are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts (1 Dillon, Municipal Corporations, 4th ed., sections 66 to 66a, inclusive, and cases cited in note to 48 L. R. A. 465), and it has been held that as to the latter class of property the legislature is not omnipotent. If the distinction is recognized it suggests the question whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation. Mr. Dillon says truly that the question has never arisen directly for adjudication in this court. But it and the distinction upon which it is based has several times been noticed. Commissioners v. Lucas, 93 U. S. 108, 115; Meriwether v. Garret, 102 U. S. 472, 518, 530; Essex Board v. Skinkle, 140 U. S. 334, 342; New Orleans v. Water Works Co., 142 U. S. 79, 91; Covington v. Kentucky, 173 U. S. 231, 240; Worcester v. Street Railway Co., 196 U. S. 539, 551; Monterey. v. Jacks, 203 U. S. 360."

The Respondent does not question the well established rule of this Honorable Court as expounded recently in Trenton vs. New Jersey, 262 U. S. 182, wherein many of the earlier cases supporting the rule are cited, to the effect that (page 187) "*in the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self government which is beyond the legislative control of the State.* A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it

sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will. * * * The power of the State, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for 'governmental purposes' cannot be questioned." The Respondent does question, however, the applicability of this rule to the instant case.

We have seen that in the case under consideration, the City of Baltimore had inherent rights of self government, safeguarded and protected by Article 11-A of the Maryland Constitution against an infringement by the State Legislature, and as a result of the exercise of these inherent rights of self government, has acquired property and contract rights. Therefore, the Respondent believes and respectfully submits that in the instant case the people of Maryland, by means of Article 11-A of the Maryland Constitution, have conferred on the City of Baltimore such a private proprietary capacity with reference to its streets, and particularly the granting of franchises therein, that in the exercise of this capacity (viz: the agreement with the Appellant for the use of the City streets), the City of Baltimore has acquired valuable contractual rights (i. e., payment due under the franchise ordinance as compensation for the use of the City streets), which the Legislature of Maryland cannot impair by such an enactment as Chapter 497, without violating the contract clause of the Federal Constitution.

Thus, in the case at bar, we have an example of a State conferring on one of its cities a private proprietary capacity, by which it has acquired contract or property rights protected by the Federal Constitution, which brings the case within the premises of the assumption of this Honorable Court in Boston vs. Jackson, 260 U. S. 309, 316.

CONCLUSION.

It has been demonstrated that Chapter 497 is an illegal and arbitrary exercise of power by the General Assembly of Maryland creating an unreasonable and discriminatory exemption from taxation in violation of Article 15 of the Declaration of Rights of the Maryland Constitution, that it is a special Act in conflict with Article 3, Section 33 of the Maryland Constitution and that its title is defective and misleading, contrary to the requirements of Article 3, Section 29 of the Maryland Constitution. It has also been shown that Chapter 497 makes no attempt to establish a reasonable classification of property entitled to exemption, but is a mere arbitrary selection of one corporation for the purpose of conferring a favor upon this corporation, which is a denial of the equal protection of the law guaranteed by the Fourteenth Amendment of the Federal Constitution. For these reasons Chapter 497 is unconstitutional and void. Moreover, it has been shown that the payments due under the franchise ordinance as compensation for the use of the City streets are not within the purview of Chapter 497, and that if such payments be construed as being within the scope of Chapter 497, Chapter 497 further violates the Federal and Maryland Constitutions.

Although in this brief the Respondent has referred to the Federal questions involved in this case, and despite the fact that the Petitioner's brief primarily discusses the Federal questions, the basic and fundamental issue here presented for determination is purely of a local nature, involving the constitutionality of a State statute under the Maryland Constitution. The case comes before this Court merely because of the fortuitous circumstance of a receivership proceeding having been first instituted in a Federal District Court. This being so, the

Federal questions are incidental and solely of secondary importance. In fact, under the rule of this Court that where a case in this Court can be decided on questions of State law, without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons, Siler vs. Louisville & Nashville R. R. Co., 213 U. S. 175, 193; Chicago G. W. Ry. Co. vs. Kendall, 266 U. S. 94, 98; Cincinnati vs. Vester, 281 U. S. 441; King vs. Mullins, 171 U. S. 404; Light vs. United States, 220 U. S. 523, 538, and since the unconstitutionality of such a tax exemption as Chapter 497 attempts to grant has been settled by the Maryland Court of Appeals in Baltimore vs. Starr Church, 106 Md. 281, there is actually no necessity for considering the Federal questions that naturally have arisen.

It is respectfully submitted that for the reasons herein given the decision of the Circuit Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A.

Annotated Code of Maryland, 1929 Supplement, Article 81, "Revenue and Taxes"—

"Section 6. The following property, except as in the next two succeeding sections provided, shall be subject to assessment to the owner and taxation for ordinary taxes in this State and in the county and/or city specified below:

(1) All real properties in this State, by whomsoever owned, in the county and/or city in which the same are situated.

(2) All tangible personal properties located in this State, by whomsoever owned, in the county and/or city in which the same are respectively permanently located, (a) provide that rolling stock of railroads worked by steam shall be taxed only as provided in Section 8(d); and (b) provided further that tangible personal property located in this State, but not owned by a domestic ordinary business corporation, and not permanently located in any county or city shall be subject to assessment and taxation in the county and/or city where the owner resides or has his or its principal office or place of business in this State; and (c) provided further that tangible personal property located in this State owned by a domestic ordinary business corporation shall be taxed in the county and/or city in which the stockholders respectively reside, or if they be non-residents of this State, then in the county and/or city in which the principal office of the corporation is situated."

"Section 7. The following shall be exempt from assessment and from State, county and city taxation in this State, each and all of which exemptions shall be strictly construed:

(16) Shares of stock in domestic railroad companies, which are subject to taxation upon their gross receipts within this State; and (from State taxes

only) the real and personal property of such railroad companies.

(21) Shares of preferred stock issued after May 31, 1927, by any domestic electric railroad or street passenger railway corporation which derives not less than sixty-five (65) per centum of its gross receipts (directly or through one or more other corporations organized under the laws of this State) from passenger revenue, and which preferred stock is preferred and limited as to dividends and assets; provided that the property acquired by such corporation with the proceeds of such preferred stock and all other property of such corporation shall be and continue subject to taxation in the same manner and to the same extent as, but to no greater extent than, it would be if all of the stock of such corporation were subject to taxation and fully taxed; and the aggregate value of all shares of stock of such corporation as ascertained and determined by the State Tax Commission after the issue of such preferred stock shall not include or reflect the value of such preferred stock so issued or any part thereof, and such aggregate value as so ascertained and determined for subsequent years shall not exceed (1) the aggregate value of all taxable shares of stock of such corporation as ascertained and determined by the State Tax Commission for the year preceding the first year in which any part of such preferred stock shall have been issued, or (2) the assessed value of the real estate of such corporation plus all other amounts which are deductible from the aggregate value of its taxable shares, or (3) the market value of all taxable shares of stock of such corporation theretofore or thereafter issued, whichever is the greatest."

APPENDIX B.

Article 11-A of the Constitution of Maryland, "Local Legislation"*

"SECTION 1. On demand of the Mayor of Baltimore and City Council of the City of Baltimore, or on petition bearing the signatures of not less than 20% of the registered voters of said City or any County (provided, however, that in any case 10,000 signatures shall be sufficient to complete a petition), the Board of Election Supervisors of said City or County shall provide at the next general or congressional election, occurring after such demand or the filing of such petition, for the election of a charter board of eleven registered voters of said City or five registered voters in any such Counties. Nominations for members for said charter board may be made not less than forty days prior to said election by the Mayor of Baltimore and City Council of the City of Baltimore or the County Commissioners of such County, or not less than twenty days prior to said election by petition bearing the signatures written in their own handwriting (and not by their mark) of not less than 5% of the registered voters of the said City of Baltimore or said County; provided, that in any case two thousand signatures of registered voters shall be sufficient to complete any such nominating petition, and if not more than eleven registered voters of the City of Baltimore or not more than five registered voters in any such County are so nominated their names shall not be printed on the ballot, but said eleven registered voters in the City of Baltimore or five in such County shall constitute said charter board from and after the date of said election. At said election the ballot shall contain the names of said nominees in alphabetical order without any indication of the source of their nomination, and shall also be so arranged as to per-

* This article was added to the Constitution by Act of 1914, Ch. 416, ratified November, 1915.

mit the voters to vote for or against the creation of said charter board, but the vote cast against said creation shall not be held to bar the voter from expressing his choice among the nominees for said board, and if the majority of the votes cast for and against the creation of said charter board shall be against said creation the election of the members of said charter board shall be void; but if such majority shall be in favor of the creation of said charter board, then and in that event the eleven nominees of the City of Baltimore or five nominees in the County receiving the largest number of votes shall constitute the charter board, and said charter board, or a majority thereof, shall prepare within six months from the date of said election a charter or form of government for said city or such county and present the same to the Mayor of Baltimore or President of the Board of County Commissioners of such county, who shall publish the same in at least two newspapers of general circulation published in said the City of Baltimore or County within thirty days after it shall be reported to him. Such charter shall be submitted to the voters of said City or County at the next general or congressional election after the report of said charter to said Mayor of Baltimore or President of the Board of County Commissioners; and if a majority of the votes cast for and against the adoption of said charter shall be in favor of such adoption, the said charter from and after the thirtieth days from the date of such election shall become the law of said City or County, subject only to the Constitution and Public General Laws of this State, and any public local laws inconsistent with the provisions of said charter and any former charter of said the City of Baltimore or County shall be thereby repealed.

SEC. 2. The General Assembly at its first session after the adoption of this amendment shall by public general law provide a grant of express powers for such County or Counties as may thereafter form a charter under the provisions of this Article. Such

express powers granted to the Counties and the powers heretofore granted to the City of Baltimore, as set forth in Article 4, Section 6, Public Local Laws of Maryland, shall not be enlarged or extended by any charter formed under the provisions of this Article, but such powers may be extended, modified, amended or repealed by the General Assembly.

SEC. 3. Every charter so formed shall provide for an elective legislative body in which shall be vested the law-making power of said City or County. Such legislative body in the City of Baltimore shall be known as the City Council of the City of Baltimore, and in any County shall be known as the County Council of the County. The chief executive officer, if any such charter shall provide for the election of such executive officer, or the presiding officer of said legislative body, if such charter shall not provide for the election of a chief executive officer, shall be known in the City of Baltimore as Mayor of Baltimore, and in any County as the President of the County Council of the County, and all references in the Constitution and laws of this State to the Mayor of Baltimore and City Council of the City of Baltimore or to the County Commissioners of the Counties, shall be construed to refer to the Mayor of Baltimore and City Council of the City of Baltimore and to the President and County Council herein provided for whenever such construction would be reasonable. From and after the adoption of a charter by the City of Baltimore, or any County of this State, as hereinbefore provided, the Mayor of Baltimore and City Council of the City of Baltimore or the County Council of said County, subject to the Constitution and Public General Laws of this State, shall have full power to enact local laws of said City or County including the power to repeal or amend local laws of said city or county enacted by the General Assembly, upon all matters covered by the express powers granted as above provided; provided that nothing herein contained shall be construed to authorize or

empower the County Council of any County in this State to enact laws or regulations for any incorporated town, village, or municipality in said County, on any matter covered by the powers granted to said town, village, or municipality by the Act incorporating it, or any subsequent Act or Acts amendatory thereto. Provided, however, that the charters for the various Counties shall provide that the County Council of the Counties shall not sit more than one month in each year for the purpose of enacting legislation for such Counties, and all legislation shall be enacted during the month so designated for that purpose in the charter, and all laws and ordinances so enacted shall be published once a week for three successive weeks in at least one newspaper published in such Counties, so that the taxpayers and citizens may have notice thereof. This provision shall not apply to Baltimore City. 'All such local laws enacted by the Mayor of Baltimore and City Council of the City of Baltimore or the Council of the Counties as hereinbefore provided, shall be subject to the same rules of interpretation as those now applicable to the Public Local Laws of this State, except that in case of any conflict between said local law and any Public General Law now or hereafter enacted the Public General Law shall control.

Sec. 4. From and after the adoption of a charter under the provisions of this Article by the City of Baltimore or any County of this State, no public local law shall be enacted by the General Assembly for said City or County on any subject covered by express powers granted as above provided. Any law so drawn as to apply to two or more of the geographical subdivisions of this State shall not be deemed a Local Law, within the meaning of this Act. The term 'geographical sub-division' herein used shall be taken to mean the City of Baltimore or any of the Counties of this State.

Sec. 5. Amendments to any charter adopted by the City of Baltimore or by any County of this State

under the provisions of this Article may be proposed by a resolution of the Mayor of Baltimore and the City Council of said the City of Baltimore, or the Council of said County, or by a petition signed by not less than 20% of the registered voters of said City or County, provided, however, that in any case 10,000 signatures shall be sufficient to complete a petition, and filed with the Mayor of Baltimore or the President of the County Council, and when so proposed shall be submitted to the voters of said City or County at the next general or congressional election occurring after the passage of said resolution, or the filing of said petition; and if at said election the majority of the votes cast for and against said amendment shall be in favor thereof, said amendment shall be adopted and become a part of the charter of said City or County from and after the thirtieth day after said election. Said amendments shall be published by said Mayor of Baltimore or President of the County Council once a week for five successive weeks prior to said election in at least one newspaper published in said City or County.

Sec. 6. The power heretofore conferred upon the General Assembly to prescribe the number, compensation, powers and duties of the County Commissioners in each County, and the power to make changes in Sections 1 to 6, inclusive, Article XI of this Constitution, when expressly granted as hereinbefore provided, are hereby transferred to the voters of each County and the voters of the City of Baltimore, respectively provided that said powers so transferred shall be exercised only by the adoption or amendment of a charter as hereinbefore provided; and provided further that this Article shall not be construed to authorize the exercise of any powers in excess of those conferred by the Legislature upon said Counties or City as this Article sets forth.

Sec. 7. The word 'Petition' as used in this Article means one or more sheets written or printed, or partly written and partly printed; 'Signature'

means the signature of a registered voter written by himself in his own handwriting (and not by his mark), together with the ward or district and precinct in which he is registered. The authenticity of such signatures and the fact that the persons so signing are registered voters shall be evidenced by the affidavit of one or more registered voters of the City or County in which said voters so signing are registered, and one affidavit may apply to or cover any number of signatures to such petition. The false signing of any name, or the signing of any fictitious name to said petition shall be forgery, and the making of any false affidavit in connection with said petition shall be perjury."

FILE COPY

SUPREME COURT
of the United States

OCTOBER TERM, 1902

No. 314

GEORGE WEEMS WILLIAMS, RECEIVER OF THE WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILROAD COMPANY,

Petitioner,

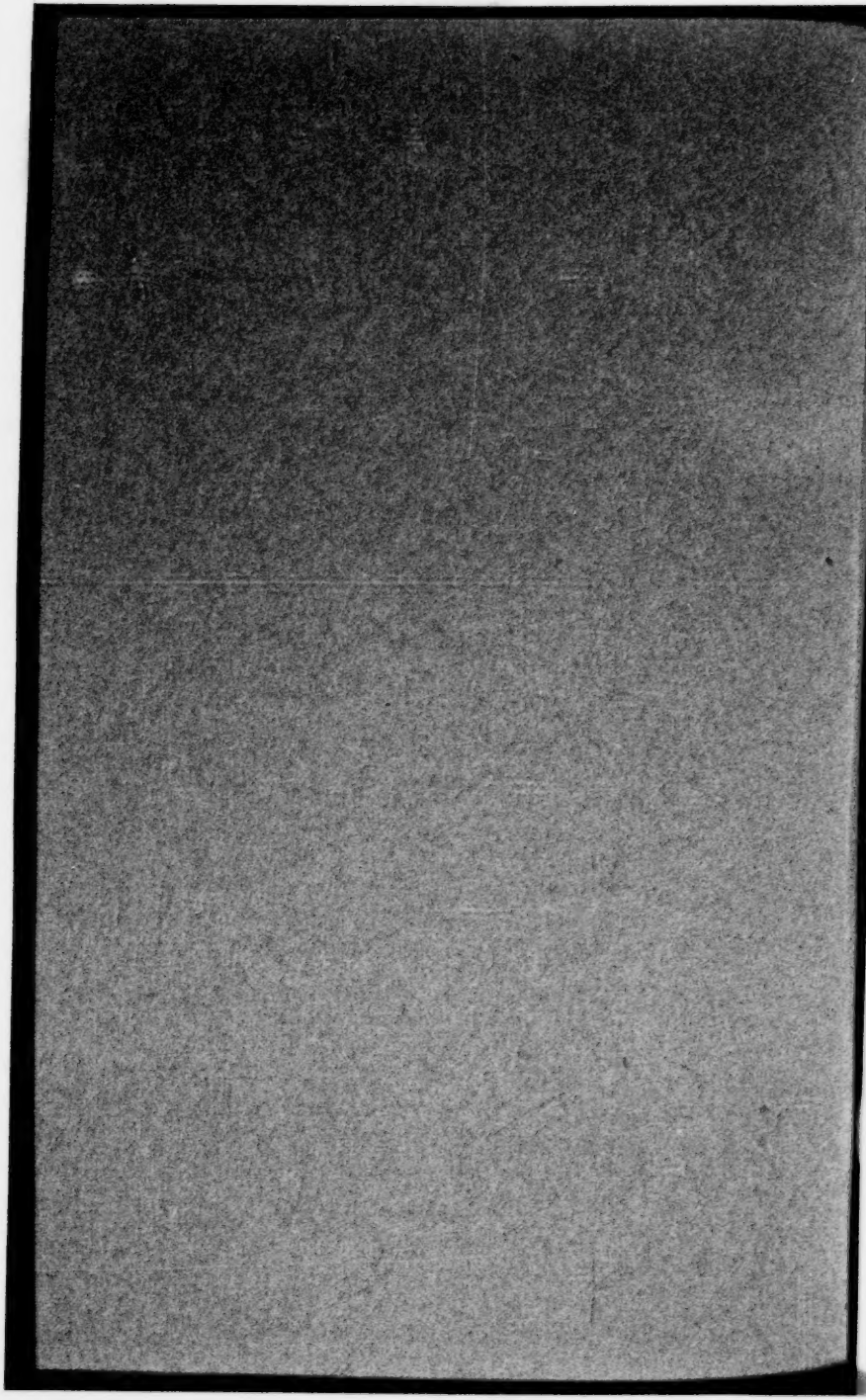
vs.

MAYOR, COUNSELOR AND ALDERMEN OF THE CITY OF ANNAPOLIS, Respondent.

BRIEF ON BEHALF OF RESPONDENT

Roscoe C. Bowie,
City Counselor.
Attorney for Respondent.

CAPITAL-GAZETTE PRESS INC., ANNAPOLIS, MD.



SUPREME COURT
of the United States

OCTOBER TERM, 1932

No. 514

GEORGE WEEMS WILLIAMS, RECEIVER OF THE WASHINGTON, BALTIMORE AND ANNAPOLIS ELECTRIC RAILROAD COMPANY,

PETITIONER,

vs.

MAYOR, COUNSELOR AND ALDERMEN OF THE CITY OF ANNAPOLIS, RESPONDENT.

BRIEF ON BEHALF OF RESPONDENT

Page 11:- Change 'Circuit Court of Maryland ' to General Docket No. 3, Maryland Court of Appeals, October Term 1932.

INDEX

	PAGE
ANSWER	1
Charges, nature of tax	8
Classification	4
Exemption, ab initio	3
by contract	3
vs. other taxpayers	5, 6
vs. continuance of operation	5
Public exigency	7
Repugnant to organic laws	10
CONCLUSION	11
THE QUESTION	1

TABLE OF CASES

	Page
Baltimore vs. Starr Church, 106 Md. 281	10
Charleston vs. Branch, 15 Wall 460	3
Dartmouth College vs. Woodward, 4 Wheaton 518	2
Dodge vs. Woolsey, 18n Howard 331. Gordon vs. Court, 3 Howard 133	3
Hodge vs. Richmond and Danville R. R. Co., 99 U. S. 348	3
Home of the Friendless vs. Rouse, 8 Wall 430	3
Hopkins vs. South. Cal. Tel. Co., 275 U. S. 1	10
Kellman vs. Ryand, General Docket No. 3, Maryland Court of Appeals, October Term 1932 (Decided January 3, 1933)	11
Louisville Gas & Elec. Co. vs. Coleman, 277 U. S. 32	10
Luman vs. Hitchins Bros. Co., 90 Md. 14	10
Mayor & City Council vs. B. & O. R. R., 6 Gill 288	4
McGee vs. Mathis, 4 Wallace 143	3
New Jersey vs. Wilson, 7 Cranch 164	2
Ohio Life and Trust Co. vs. Debolt, 16 Howard 416	3
Royster Guano Co. vs. Virginia, 253 U. S. 412	10
State vs. B. & O. R. R., 127 Md. 434	4
State vs. B. & O. R. R., 48 Md. 49	4
Power Co. vs. Saunders, 274 U. S. 493	10
Quaker City Cab Co. vs. Pa., 277 U. S. 389	10
Tomlinson vs. Branch, 15 Wall 460	3
Tucker vs. Ferguson, 22 Wall 527	3

THE QUESTION

Is Chapter 497 of the Acts of the General Assembly of Maryland, 1931, a valid exercise of the legislative power?

THE ANSWER

Art. 3, Section 33 of the Maryland Constitution limits the power of the legislature in passing local or special laws; the 14th. Amendment to the Federal organic laws forbids any state denying the equal protection of the laws to those amenable thereto; Art. 15 of the Bill of Rights of Maryland's organic law commands taxation shall be assessed by uniform rules, particularized in Art. 81, Section 6, Paragraphs 1 & 2, Maryland 1929 Code, Supplement. The terms of these several enactments are so clear that a mere cursory reading of them in conjunction with the caption of Chap. 497 of the 1931 Acts, supra, indisputably evidences a violation by the latter of the former inhibitions. It may be, that, expediency commands such violation, the immediate public convenience of the road, railroad riding public considered. It is to be seriously doubted nevertheless that such convenience—admitting arguendo, it is that—justifies the sacrifice of principle to the pretended expediency. For, if "principle" means anything at all, it means that though expediency seems to dictate its momentary surrender, it is but a "seeming"; since, in the long end the public convenience will infinitely be better subserved by adhering to the principle than by surrendering it to an alleged expediency. "Better subserved," because it is inevitable that chaos follows the surrender of principle; if not, why "principle" at all? And, chaos ensuing as it must ensue, what of the "public convenience" as compared with that arising from the lack of street car service?

Just because a tax paying corporation is losing money through causes over which it has no control is no reason for legislative violation of the organic law. Admitting

that the corporation is a "public utility," what of that? The federal and state constitutions make no exception in these premises in favor of such corporations. And, if the courts pretend that because they serve a public use, that is good reason for allowing the legislature to transgress its powers, the former themselves offend and equally transgress. There is no logic, worthy the name that can reach any conclusion other than that Chap. 497 in question, its plain terms being what they are, violates the sections of the organic laws above referred to, their plain terms being what they are seen to be. Hence, the difficulty, yes impossibility of honestly referring to any judicial authority that holds otherwise, since there is none.

New Jersey vs. Wilson, 7 Cranch, 164 and *Dartmouth College vs. Woodward*, 4 Wheaton, 518, often relied upon to justify Acts like Chap. 497 herein, in truth are authority for denying the legislative right to exempt the corporation, in addition to the other prescriptions laid down by the organic law. It is denied that these cases are authoritative in the taxpayer's behalf. They are exactly antithetical. For, those cases command that a contract once entered into be faithfully fulfilled by the parties, denying to the legislature anywhere, supreme as it is in its proper domain, the right to pass a "law" whereby one of the parties is enabled to breach the contract. Yet, that is what Chap. 497 does—passes a "law" seeking to enable one of the parties—petitioner herein—to breach the contract between his cestui and the cities in question. Thus the inflexible "principle" of the matter at bar finds the very cases on which petitioner relies, supreme authority for the defendant cities. For, it is no "principle" that is not applicable conversely as well as directly. Thus, the Dartmouth College facts—exemption by contract—are the converse of those at bar—attempted exemption despite the contract. That is, the contract is everything; the legislative power nothing, as far as permitting a breach is involved. The District Court in the

instant case, with all respect must have come to a like conclusion with that reached by the Appellate Court herein, had it followed the immutable principle vitalized by Mr. Justice Marshall in the 4th Wheaton, 518, above, viz: that a contract is sacred and so designated by the federal organic law. Hence, that great justice's irrefutably logical, hence truthful answer to the question submitted to him by the "Dartmouth College" facts.

The facts at bar, but indisputably controlled by the same principle, are the exact converse. With all respect, the District Court erred when it said that, because, as in the 4th Wheaton supra, the corporation might exact exemption as a condition of its location in a particular jurisdiction that, having located there without such initial exemption, the legislature might subsequently violate the organic law of the jurisdiction, and, exempt it from taxation. Petitioner relies on a long line of cases decided by the U. S. Supreme Court to support the erroneous conclusion reached by the District Court herein. These cases are:—

1. *Home of the Friendless vs. Rouse,* 8 Wall, 430, 438;
2. *Gordon vs. Appeal Tax Court,* 3 Howard, 133;
3. *Ohio Life & Trust Co. vs. Debolt,* 16 Howard, 416-432;
4. *Dodge vs. Woolsey,* 18 Howard, 331; *Bank* 360;
5. *McGee vs. Mathis,* 4 Wallace, 143;
6. *Tomlinson vs. Branch,* 15 Wall, 460;
7. *Charleston vs. Branch,* 15 Wall, 470;
8. *Tucker vs. Ferguson,* 22 Wall, 527;
9. *Hodge vs. Richmond & Danv. R. Co.,* 99 U. S. 348;

But, each of these cases merely reaffirms the doctrine announced in the Dartmouth College case, and which as attempted to be shown above, is supreme authority for denying to the Maryland legislature what it attempted in Ch. 497, Acts General Assembly Maryland 1931. And, equally is such right denied by, *Columbus & Greenville Ry. vs. Miller,* 283 U. S. 96 though relied on by appellant. This case merely decides that "classification" may be resorted to in fixing the taxation status of the corporation BEFORE it became a rate payer. That principle has never been denied. There is no case, nevertheless that holds that, AFTER the rate payer has become such under the laws in force at the time it began to operate it might afterwards be exempted.

It is not denied that,

Mayor & City Council vs. B. & O. R. R., 6 Gill, 288;

State vs. B. & O. R. R., 48 Md. 49 and

State vs. B. & O. R. R., 127 Md. 434,

affirm the right of the legislature to grant the exemption; BUT IN THE EXEMPTION WITH WHICH THE DEFENDANT RAILROAD WAS CONCERNED ABOVE IT WAS GRANTED BY THE CHARTER—succinctly, by CONTRACT, so that the decisions just above referred to again follow the immutable principle recognized by the 4th Wheaton, 518.

At bar, no such exemption was CONTRACTED FOR; on the contrary, when the charter of petitioner's cestui was granted it carried with it a contract to pay taxes, state, county, city, what not, whether they be called that, or "rental" for the streets of the cities, or franchise charges. The meat of the matter is they agreed to PAY for the right to operate. They agreed to PAY for the simple reason that the charges were to be met out of ea[illegible]

ings, and which seemingly was done until the recent economic stress. If that stress, on principle, justifies the breach by the street railroad companies of their contracts to pay taxes of no matter what description, it commands that the legislature authorize breaches of their contracts to pay like charges by every taxpayer in the two communities served by the distressed railroad companies. Unless, therefore there is such relief granted to all such other rate payers, the Act relieving the cestui at bar is seen to be violative of the compact under which all the units of the particular social organization agreed they would be bound.

It is seen to be useless to refer to so-called judicial authority pretending to support the right of the two companies represented by petitioner to avoid taxation, on the plea that only by such exemption can they exist. "Useless," because there is no such authority founded on the recognition of "principle" that permits an Act like Ch. 497 to be enforced. For, all units of the community are in like distress. Their combined welfare is of greater moment to the community than that of any single unit, such as railroad companies. The latter may "die" without producing the chaos that follows the collapse of the whole communal organization, bound to ensue if its several constituents are called upon to carry the tax burdens of the exemptees. And, that is precisely what those units must do if petitioner prevails, since without the funds produced from taxation the organization "dies." So that, if petitioner's cestui are exempted, why not each corporation and all of the individuals in the region served by them? These individuals, the present economic exigency considered, are entitled too, to ask exemption. They are entitled to it if petitioner's cestui are. Then what? Chaos, of course. Which, ever is the inevitable sequence when expediency is allowed to overcome principle.

In reply to the foregoing, it may be suggested that exemption having been granted as a condition of the establishment of corporate enterprise in a particular locality, the remaining units must bear the tax burdens to the exclusion of the exempted corporation; and that, therefore there is no distinction between granting the exemption ab initio, and afterwards, as suggested by the District Court in its opinion. There are several rejoinders to such a proffert. The first, and probably the correct one is: No one, ab initio or, at any time in strict justice, is entitled to exemption from the payment of taxes. The second is: Nothing that man produces for use, consumption or for any other purposes ought, in strict justice be taxed, the expense of administering communal affairs to be derived from other sources—for example, from rent imposed by the community on the natural resources indigenous to it.

Moved by hope of material advance in the formative stage many communities contracted with enterpreneurs to bring their businesses to their doors, the consideration for which was exemption from taxation; and, contracts were so made. It cannot be denied that all such contracts are economically bad, just because they accomplish what will be accomplished if petitioner prevails in this action, viz: cast the burden of their escaped taxes onto the shoulders of the other units of the organization. But, such contracts, while economically bad, as in the 4th Wheaton and all the cases following, cited to in the previous pages hereof, are legally "good," because to hold otherwise would violate the immutable principles of honesty and fair dealing, without which no organization can endure whatever by its material riches. Now comes petitioner claiming that because the early enterpreneurs were legislatively exempted, therefore the legislature may lawfully exempt his cestui, though they contracted to pay. That, patently is piling Pelion on Ossa. As if lawful exemptions, admittedly economically bad, are not enough

of a burden to those who have to make the exemptions good, without adding to that burden by piling on the now bent shoulders of the other constituents, further exemptions that are patently unlawful. It is submitted that, if a "grave public exigency is presented by the possibility of suspension of the operation of an interurban electric road connecting the cities of Baltimore, Washington and Annapolis—because it did not earn its operating charges," (PP. 2 & 3, Appellee's Brief in the *U. S. Circuit Court of Appeals*, Nos. 3347-51.) a graver one is presented by adding another exemptee to those lawfully exempted as above, the distress of other tax paying units of the communal organizationn just now carefully considered.

If the petitioner's cestui cannot earn their operating charges, and hence cannot pay their taxes, and their suspending operations would be a "grave exigency" (seriously to be doubted, other methods of transportation considered) for the car riders, there are many ways to avoid suspension other than by creating a "graver public exigency" which their exemption from taxation will produce. If there be such a "grave public exigency," such a desperate disease of the body politic that a desperate remedy must be applied, such a remedy is not found in a violation of the social compact herein sought to be applied. It is very plain that such a remedy, instead of mending the disease, aggravated it by attempting the relief of one patient at the expense of all the others. It necessarily follows from what is universally known about the present economic stress, affecting every unit in the organization, that the very ground assigned by the legislature in the Caption of Ch. 497—"The Washington, Baltimore and Annapolis Electric Railway Co., petitioner, did not earn its operating charges"—is exactly the reason for not exempting it from taxation.

—2—

In the preceding discussion it is noted that no distinction is made between the money due under the franchise ordinances and that due from "taxes" levied on the "property" of the railroad, which the Circuit Court of Appeals holds is alone attempted to be exempted. It must be clear, at this stressful time if never before that, there is no real distinction between the two sources of revenne to the state and city and county. Section 1 of the Act (Ch. 497) specifically exempts the R. R. Company from "all county, and city taxes and CHARGES IN THE NATURE OF A TAX FOR THE YEARS during which the property is so used but not exceeding two years etc."

Now, reading Sec. 14 of the Annapolis ordinance of July 1, 1907 it is discovered just exactly what the "CHARGES in the nature of a TAX" comprise, viz: "a tax of 4 and one-half mills for every passenger etc." So that the Act—Ch. 497—does attempt to exempt the rate payer from all charges in the nature of a tax, whether technically and etymologically such "charges" may be characterized as "Taxes" or not. And, if the remedy the legislature attempted and the railroad company sought is to be effective, the exemption is bound to embrace all the taxable charges and all such "in the nature of a tax" due from the rate payer. Yet, is that immaterial, since, if the legislature has the power to exempt at all, Ch. 497 may be supplemented so as to include the items which the Court of Appeals holds are not now included in the exemption. The answer to that proposal is, as seen in the foregoing pages that, the railroad company having commenced business without immunity from taxation, because of its corporate charter, and, subscribing to the terms of the Annapolis Ordinance of July 1, 1907, involving "charges" of no matter what description—taxes and franchises—that is to say "CONTRACTED TO PAY ALL SUCH CHARGES." THE LEGISLATURE

NOR ANY OTHER AGENCY HAS NOW THE RIGHT (much as the former may have the power) to empower the railroad company or any other tax payer to violate its or his contract.

It is admitted that the exigency is great; that the railroad company is in dire straits financially; that some inconvenience will arise if it suspends operations. It must nevertheless be seen that a greater exigency must arise if the railroad is allowed to operate only because it is permitted to breach its contract with the other units of the communal organization of which it is one. If it can't operate without such a breach, sought to be sanctioned by the organization's governmental agency, infinitely better must it be seen to be that it cease functioning.

If ever in the history of our country a like breach ought not be suffered, this moment is that period. Obviously, the other units cannot bear a greater burden than now they are carrying, but which will be greater if they must carry the tax charges from which appellant seeks exemption.

Is it not plain that, carried to its logical end, such legislation as here attempted must "make confusion worse confounded"? Eliminating the question of the "sanctity of contract" which makes the instant question legalistic and hence resolved against petitioner (see all the authorities cited to herein) there is the greater question of the reciprocal rights and obligations of all the units of the social order to one another if that order is to be perpetuated. If our present system for maintaining that order be unequal to the task imposed on it, better far to acknowledge that fact than to perpetuate it by makeshift alterations that, in the long last must be seen to be destructive of the "heavenly" order all of the units are struggling for.

—3—

The Act is bad because it violates Sec. 33 of Art. 3 of the Maryland organic law.

Royster Guano Co. vs. Virginia, 253 U. S. 412;

Louisville Gas & Elec. Co. vs. Coleman, 277 U. S. 32;

Quaker City Cab Co. vs. Pa., 277 U. S. 389;

Luman vs. Hitchins Bros., 90 Md. 25.

It is bad because it violates the 14th Amend. to the Federal organic law.

Power Co. vs. Saunders, 274 U .S. 493;

Hopkins vs. So. Calif. Tel Co., 275 U. S. 403.

It violates Art. 15 of the Maryland Bill of Rights.

Baltimore vs. Starr Church, 106 Md. 281, and all the authorities referred to in the opinion of the court (Circuit Court of Appeals) p. 30 Transcript of Record. In this 106 Md. the *Circuit Court of Appeals* quotes an excerpt that is peculiarly confirmatory of all that has been advanced herein, thus:

> "If the Legislature may lawfully do this in this particular instance, why not in another, and another, until there would be an almost indefinite number of exemptions, and we think such acts should be stricken down as null, and inoperative, repugnant to the organic law, and prolific of obvious abuses."

Not only "repugnant to organic law," but to the social order, which, after all, is the sole reason for enacting the organic law. Unhappily, the present economic stress proves that "there are more things in heaven and earth than are dreamed of in our philosophy," and that no matter how wise the enactment of the organic law at the time of its adoption, there are contingencies which it cannot solve. The present stress is one of them. Nor is *it*

solved by the enactment of Ch. 497 herein; that, as must be clear, makes worse an already "bad" situation.

CONCLUSION

Here is the "face of the matter": The railroad applied for a charter; it got it without reservation of any privileges or immunities; it was accorded the use of the streets in question under the terms of ordinances that it accepted. It functioned perhaps profitably for at least 24 years paying at times during that period interest on a $9,292,500 funded debt, and dividends perhaps from time to time on 35,221 shares of Preference and maybe on 60,000 shares of common stock. Now, it can't earn its operating charges, nor interest on the debt nor dividends of course on the stock. Hence, its request for abatement of taxes of all kinds.

The one ground it stands on is, the public necessity for its continued operation. But, if that be true, its taxation burdens are bound to be carried by others of the very public whose convenience is said to be catered to by its operation. That inconvenience in the long run is going to outweigh the lack of street car service, as per the excerpt from the 106 Md. on page 7 hereof, and as was stated in a very recent case, January 3, 1933, *Circuit Court of Maryland,* in the case of *Kelman vs. Ryan,* "It is recognized and established by the Courts of this country, both Federal and State, that the legislature may, under conditions, create classes and subject all persons coming within the classifications to burdens or duties not imposed upon individuals outside of the classes, or may confer rights and privileges upon those within the classes that are not enjoyed by others not embraced therein. These classifications, however, must not be arbitrary or unreasonable, but must rest upon some difference which bears a reasonable and just relation to the act—the thing —in respect of which the classification is proposed. Or as otherwise stated, "a statute which denies to one per-

son the protection that is accorded to others under the same conditions and in the like situation, or which imposes on one person a burden not similarly borne by others is in both instances invalid under a paramount organic law because of its discrimination." *Luman vs. Hutchins Bros. Co.*, 90 Md. 14. In deciding this case we are to determine whether there are persons not named in the statute who are by it wrongfully denied the equal protection of the laws."

We believe that the discrimination created by this Act in exempting the Washington, Baltimore and Annapolis Electric Railroad Company from taxation does not rest upon a substantial or recognizable difference between the class embraced and the class excluded, or as stated by the Honorable Judge McSherry, in *Luman vs. Hitchins Bros.*, supra, "it does not rest upon some difference which bears a reasonable and just relation to the act—the thing—in respect of which the classification is proposed;" therefore, in our judgment the Act is arbitrary and unreasonable and for such reason the Act not only violates Art. 3, Section 33 of the Md. Constitution, of Art. 15 of Maryland Bill of Rights, but also of the Fourteenth Amendment of the Constitution of the U. S.

Respectfully submitted,

ROSCOE C, ROWE,

City Counselor,

Attorney for Respondent.